DOCKET

SUPREME COURT
OF THE UNITED STATES

No. 09-751
Title: Albert Snyder, Petitioner
v.
Fred W. Phelps, Sr., et al.
Docketed: December 29, 2009
Lower Ct: United States Court of Appeals for the Fourth Circuit
Case Nos.: (08-1026)
Decision Date: September 24, 2009
Questions Presented

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~
Dec 23 2009	Petition for a writ of certiorari filed. (Response due January 28, 2010)
Jan 20 2010	Brief of respondents Fred W. Phelps, Sr., et al. in opposition filed.
Feb 3 2010	DISTRIBUTED for Conference of February 19, 2010.
Feb 16 2010	DISTRIBUTED for Conference of February 26, 2010.
Mar 1 2010	DISTRIBUTED for Conference of March 5, 2010.
Mar 8 2010	Petition GRANTED.
Mar 22 2010	The time within which to file the joint appendix and petitioner's brief on the merits is extended to and including May 24, 2010.
May 24 2010	Brief of petitioner Albert Snyder filed.
May 24 2010	Joint appendix filed. (Statement of costs received)
May 24 2010	Supplemental joint appendix filed.
May 27 2010	Brief amicus curiae of Anti-Defamation League in support of neither party filed.
May 28 2010	Brief amici curiae of Senators Harry Reid, Mitch McConnell, and 40 Other Members of the U.S. Senate filed.
Jun 1 2010	Brief amicus curiae of Center for Constitutional Jurisprudence in support of neither party filed.
Jun 1 2010	Brief amicus curiae of American Center for Law and Justice in support of neither party filed.
Jun 1 2010	Brief amici curiae of Kansas, et al. filed.
Jun 1 2010	Brief amicus curiae of The American Legion filed.
Jun 1 2010	Brief amicus curiae of Veterans of Foreign Wars of the United States. filed.
Jun 1 2010	Brief amici curiae of The John Marshall Law School Veterans Legal Support Center & Clinic, et al. filed.
Jun 15 2010	The time within which to file respondents' brief on the merits is extended to and including July 7, 2010.
Jul 7 2010	Brief of respondents Fred W. Phelps, Sr., et al. filed.

Jul 13 2010	Brief amici curiae of Thomas Jefferson Center for the Protection of Free Expression, et al. filed.
Jul 14 2010	Brief amicus curiae of Liberty Counsel filed.
Jul 14 2010	Brief amicus curiae of Reporters Committee for Freedom of the Press, et al. filed.
Jul 14 2010	Brief amici curiae of American Civil Liberties Union, et al.
Jul 14 2010	Brief amici curiae of Scholars of First Amendment Law filed.
Jul 14 2010	Brief amici curiae of Foundation for Individual Rights in Education, et al. filed.
Jul 14 2010	Brief amicus curiae of Rutherford Institute filed. (Distributed)
Jul 20 2010	CIRCULATED.
Jul 20 2010	SET FOR ARGUMENT ON Wednesday, October 6, 2010.
Jul 26 2010	Record received from U.S.C.A. for 4th Circuit. (1 box)
Aug 6 2010	Reply of petitioner Albert Snyder filed. (Distributed)
Sep 2 2010	Record received fro U.S.D.C. for District of Maryland (Baltimore) (2 boxes)
Oct 6 2010	Argued. For Petitioner: Sean E. Summers, York, Penn. For respondents: Margie J. Phelps, Topeka, Kan.

PETITION FOR WRIT OF CERTIORARI

Supreme Court, U.S.
FILED

09-751 DEC 23 2009

No. 09-

OFFICE OF THE CLERK
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IN THE
Supreme Court of the United States

ALBERT SNYDER,

Petitioner,

v.

FRED W. PHELPS, SR., SHIRLEY L. PHELPS-ROPER, REBEKAH A. PHELPS-DAVIS, WESTBORO BAPTIST CHURCH, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Fourth Circuit reversed a jury determination in favor of Albert Snyder ("Snyder") for the intentional harm perpetrated against him by Fred W. Phelps, Sr., Westboro Baptist Church, Incorporated, Rebekah A. Phelps-Davis and Shirley L. Phelps-Roper (collectively, "Phelps"). Snyder's claim arose out of Phelps' intentional acts at Snyder's son's funeral. Specifically the claims were: (1) intentional infliction of emotional distress, (2) invasion of privacy and (3) civil conspiracy. These claims were dismissed by the Fourth Circuit notwithstanding that (a) *Hustler Magazine, Inc. v. Falwell* does not apply to private versus private individuals; (b) Snyder was a "captive" audience; (c) Phelps specifically targeted Snyder and his family; (d) Snyder proved that he was intentionally harmed by clear and convincing evidence;[1] and (e) Phelps disrupted Snyder's mourning process. The Fourth Circuit's decision gives no credence to Snyder's personal stake in honoring and mourning his son and ignores Snyder's right to bury his son with dignity and respect.

Three questions are presented:

1. Does *Hustler Magazine, Inc. v. Falwell* apply to a private person versus another private person concerning a private matter?

2. Does the First Amendment's freedom of speech tenet trump the First Amendment's freedom of religion and peaceful assembly?

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[1] Because Snyder sought punitive damages, he was required to prove his case by clear and convincing evidence. Furthermore, Snyder was required to prove actual malice. Snyder carried his burden on both issues.

3. Does an individual attending a family member's funeral constitute a captive audience who is entitled to state protection from unwanted communication?

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OPINION BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is reported at *Snyder v. Phelps, et al.*, 580 F. 3d 206 (4th Cir. 2009). The Fourth Circuit reversed the October 31, 2007 jury verdict and the decision of the District Court of Maryland reported at 533 F. Supp. 2d 567 (D. Md. 2008). See Appendices A-B.

STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

The Fourth Circuit's opinion was rendered on September 24, 2009.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

First Amendment

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

STATEMENT OF THE CASE

On March 3, 2006, Snyder's son, Lance Corporal Matthew Snyder, was killed in Iraq. Thereafter, two uniformed Marines notified Snyder of his son's death and that his son would be transported back to the United States for burial. The Snyder family planned a traditional Christian burial at St. John's Catholic Church in Westminster, Maryland. An obituary was submitted to the local newspapers concerning Snyder's son's death. Snyder requested a private funeral.

In response to Lance Corporal Matthew Snyder's tragic and unfortunate death, Phelps issued a news or press release indicating their specific intention to picket his funeral. Phelps were not invited to Matthew Snyder's funeral, and in fact, they knew that their presence would not be well-received by the Snyder family. Furthermore, Phelps knew that their presence could elicit violence, and in this regard, Phelps requested law enforcement protection. In response to Phelps' concerns for violence, law enforcement deployed a team of five sheriffs to escort Phelps and provide security for them during their picket. Indeed, the sheriffs' presence was for the express and limited purpose of providing security for Phelps. Law enforcement determined that Phelps' presence created a credible threat of violence. In this regard, local law enforcement deployed a SWAT team and a command post was established. Additionally, the fire department, ambulances and miscellaneous government equipment were in the area on standby to prepare for the violence associated with Phelps' presence. The command center consisted of an incident commander (also a member of the SWAT team), local, county and state police, a traffic engineer, and communication clerks. The enormous amount of government resources associated with Phelps' presence required a Winnebago to be utilized as a command center, not to mention police cruisers, fire trucks and ambulances.

Not surprisingly, Phelps disrupted Snyder's son's funeral at his church. Indeed, Phelps' presence did not allow for normal access to the church campus and changed the entire atmosphere of the religious services for Snyder and his family. In short, Phelps' presence created a negative and circus-like atmosphere during a solemn and religious occasion. Phelps' activities added insult to injury during a time of grief and mourning. In addition to harming the Snyder family, Phelps' activities also injured parish families who were present to share in the Snyder family's grief.

Directly across the street from where Phelps gathered, there is a parish elementary school. Because of the Phelps' presence at the funeral, law enforcement and church officials found it necessary to take the necessary steps to protect school children from Phelps. In this regard, all teachers were required to pull down the blinds so that the children could not see Phelps. In addition, each parent received advance warning of Phelps' appearance and officials notified parents that their children should avoid using the main entrance of the school. Tellingly, the school was in a lock-down mode as a safety precaution. Further, the children were not allowed to play outside and there would be no dismissal until Phelps left the church area. While attempting to mourn, Snyder watched this series of events take place.

Snyder watched his family and friends witness this horrific series of events take place during a time when his family, friends and parishioners were attempting to mourn.

In accordance with their threats, Phelps traveled from Kansas and across the country to Westminster, Maryland for the express purpose of protesting Lance Corporal Matthew Snyder's funeral. With law enforcement protection, Phelps were escorted by sheriff personnel from the outskirts of town to the church. Phelps' sole purpose for traveling to Westminster, Maryland was to picket and protest the funeral. Phelps knew that the funeral was at a Catholic church and consequently targeted the Snyder family by bringing and flaunting a sign that stated "Pope in Hell." Additionally, Phelps knew that Matthew Snyder was a Marine and brought a sign that said "Semper Fi Fags." Because the funeral was in Maryland, Phelps brought a sign that said "Maryland Taliban" to the funeral. Phelps even brought a sign to the church which pictured two men performing anal sexual intercourse. Perhaps most notably, Phelps brought a sign that said "Matt in Hell," "You're Going to Hell," and "God Hates You" to Matthew Snyder's funeral. Matthew was the only deceased person at the church so it follows that Phelps were referring to Matthew. Indeed, Snyder testified that it was obvious to him that Phelps were referring to his son. The Catholic priest, Father Leo, who was present and assisted in the Snyder family's Christian burial, had never observed anyone protesting a funeral or church service or disrupting it in such a manner. Captain Maas has been in law enforcement for 31 years and had never witnessed anyone specifically protesting a funeral.

Major Long has been in law enforcement for 37 years and had never observed a funeral being intentionally protested.

Admittedly, Phelps had no concern for the Snyder family and only used the funeral as a means of commanding an audience. Indeed, Phelps use funerals as a platform to command an audience. As Phelps admitted, they capitalize on military funerals because it is more "efficient" to get their message to more media.

These facts are the facts that Snyder and his family will live with for the rest of their lives. After all, Snyder had one (and only one) opportunity to bury his son and that occasion has been tarnished forever. Snyder deserved better. Matthew deserved better. A civilized society deserved better.

REASONS FOR GRANTING THE PETITION

The question of whether *Hustler Magazine, Inc. v. Falwell* is applicable to private individuals versus private individuals requires resolution by this Court. If *Hustler Magazine* is applied in this fashion, the victimized private individual is left without recourse. Complicating matters further, the Fourth Circuit has allowed Phelps (in this instance) to dictate what is a matter of public concern. Indeed, the Fourth Circuit's analysis encourages individuals to engage in "loose, figurative or hyperbolic language" to afford more First Amendment protection — even if that language is targeted at another private individual at a private, religious funeral — it encourages harsh rhetoric.[2] Put succinctly, the Fourth Circuit has extended *Hustler* to private versus private individuals, allowed speakers to subjectively determine what is a matter of public concern, and afforded more First Amendment protection to speech that is outrageous.

Whether the freedom of religion and assembly is subordinate to the freedom of speech is an important question because by necessary implication, one of the tenets of the First Amendment is undermined. By extending *Hustler Magazine, Inc. v. Falwell* to private versus private individuals, the Fourth Circuit necessarily determined that the freedom of religion and peaceful assembly is subordinate to freedom of speech. The Fourth Circuit chose one individual's First Amendment rights over those of another.

Assuming that this Court extends *Hustler Magazine, Inc. v. Falwell* to private versus private individuals, another question arises as to whether "captive" funeral attendees have any recourse where individuals intrude upon a private religious funeral. The Fourth Circuit failed to address this issue and thus determined, by implication, that funeral attendees (peacefully assembling and practicing religion) are defenseless in the face of personally directed protests.

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[2] Although the Fourth Circuit excused (or even encouraged) Phelps' behavior as rhetorical, a cursory review of the record reveals that Phelps meant his words literally, not rhetorically.

I. REVIEW IS WARRANTED TO DETERMINE IF *HUSTLER MAGAZINE, INC. V. FALWELL* APPLIES TO PRIVATE PERSONS VERSUS PRIVATE PERSONS CONCERNING PRIVATE MATTERS.

A. Extending *Hustler Magazine, Inc. v. Falwell* is not warranted.

In *New York Times v. Sullivan*, 376 U.S. 254 (1964), this Court determined that "the Constitution delimits a State's power to award damages for libel in actions brought by public officials against critics of their official conduct. Since this is such an action, the rule requiring proof of actual malice is applicable." *Id.* at 283. Thereafter, this Court held that:

> [P]ublic figures and public officials may not recover for the tort of intentional infliction of emotional distress by reason of publications such as the one here at issue without showing in addition that the publication contains a false statement of fact which was made with 'actual malice,' i.e., with knowledge that the statement was false or with reckless disregard as to whether or not it was true.

Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 56 (1988).

In *Snyder v. Phelps, et al.*, 580 F. 3d 206 (4th Cir. 2009), the Fourth Circuit recognized that this Court has limited the *Times* and *Hustler* line of cases to public figures and public officials, *id.* at 218 (quoting *Curtin*

Publ'g Co. v. Butts, 388 U.S. 130, 164 (1967)), and the court further conceded that this Court stopped short of extending *Times* to speech targeting private figures. *Id.* (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 344-346 (1974)). Nevertheless, the Fourth Circuit has now, on its own accord, extended *Times* and *Falwell* to speech targeting private figures.[8]

By extending *Hustler*, the Fourth Circuit has determined, among other things, that (1) a private individual can verbally attack another private individual without a civil remedy, (2) the speaker subjectively dictates the definition of a matter of pubic concern, (3) the speaker has incentive to act outrageously or use harsh rhetoric in order to be afforded more First Amendment protection, (4) a private individual's private matter can be utilized as another's platform for speech, and (5) private individuals have no recourse if they are intentionally harmed.

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[8] The Fourth Circuit places significant weight on *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990). However, *Milkovich* is a defamation case as opposed to an intentional infliction of emotional distress matter. Moreover, even in *Milkovich*, this Court stated,

> "[t]hus, where a statement of "opinion" on a matter of public concern reasonably implies false and defamatory facts regarding *public figures or officials*, those individuals must show that such statements were made with knowledge of their false implications or with reckless disregard of their truth. Similarly, where such a statement involves a private figure on a matter of public concern, a plaintiff must show that the false connotations were made with some level of fault as required by *Gertz*."

Id. at 20-21 (emphasis added). In the instant matter, the Fourth Circuit has determined (1) that Phelps' words and actions were matters of public concern — notwithstanding the context of a funeral and a "captive" audience, and (2) that, as a matter of law, Snyder cannot prove any level of intentional harm required by *Gertz*. Even pursuant to *Milkovich*, a plaintiff is entitled to prove that he or she was intentionally harmed.

B. Extending *Hustler Magazine, Inc. v. Falwell* necessarily creates a conflict of First Amendment rights and intrudes upon a funeral attendees' right to mourn the deceased.

Herein lies the dilemma with extending *Times* and *Falwell* (especially in the funeral or "captive" context). In extending these cases, the Fourth Circuit has determined that Phelps' First Amendment right to free speech was more important than Snyder's right to exercise his religion or assemble peacefully. As we know, the First Amendment provides, among other things, that Congress shall make no law prohibiting the free exercise of religion. When Snyder buried his son Matthew at his church, he was exercising his religious beliefs. Further, the First Amendment states that Congress shall not prohibit the right of people to peacefully assemble, as family members must do at a funeral.

The Fourth Circuit did not attempt to juxtapose these equally important Constitutional principles on the freedom of speech. The Fourth Circuit's reasoning would make more sense if Snyder had gone to Phelps' church to practice his religion. The unfortunate reality is that Phelps came to Snyder's church to disrupt his peaceful assembly and mourning process.[4] When the Fourth Circuit chose to extend *Times* and *Falwell* to private versus private individuals, it necessarily chose to subordinate Snyder's First Amendment rights — even though Snyder was the victimized party. It goes without saying that Phelps had a multitude of other venues to express their views.

Additionally, the Fourth Circuit has concluded, implicitly, that Snyder has no privacy interest at his church when burying his son. However, the Sixth Circuit has concluded just the opposite. "Individuals mourning the loss of a loved one share a privacy right similar to individuals in their homes or individuals entering a medical facility." *Phelps-Roper v. Strickland*, 539 F.3d 356, 364-365 (6th Cir. 2008) (citing *Hill v. Colorado*, 530 U.S. 703 (2000); *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753 (1994); *Frisby v. Schultz*, 487 U.S. 474 (1988)). The Sixth Circuit also concluded that the "[u]nwanted intrusion during the last moments the mourners share with the deceased during a sacred ritual surely infringes upon the recognized right of survivors to mourn the deceased." *Id.* at 366 (*relying upon National Archives and Records Admin. v. Favish*, 541 U.S. 157, 168 (2003).[5] As the Sixth Circuit pointed out,

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[4] The Fourth Circuit focused entirely on speech and ignored the totality of the circumstances. For discussion purposes, assume that Phelps went to a location other than St. John's Catholic Church in Westminster, Maryland. Phelps could have expressed the same so called message and Matthew Snyder's funeral would not have been disrupted. Similarly, the grieving and mourning process would not have been disrupted.

[5] Similarly, this Court has also protected victims from being solicited for a 30 day period following an accident or death,

(Cont'd)

"it goes without saying that funeral attendees are also emotionally vulnerable." *Id.*

II. REVIEW IS WARRANTED TO RESOLVE WHETHER CAPTIVE FUNERAL ATTENDEES HAVE A RIGHT TO AVOID UNWELCOME COMMUNICATIONS.

Snyder submits that the Fourth Circuit incorrectly determined that Phelps activities were protected under the First Amendment despite the fact that Snyder was a private individual and Phelps was a private individual. Nevertheless, even assuming, *arguendo*, that the Fourth Circuit's decision to grant an absolute First Amendment defense was appropriate, it failed to consider the counterveiling impact of the fact that Snyder was a "captive audience" at his son's funeral. Review of this issue in the present case is necessary because there is a split among the Circuits as to whether an individual attending a family member's funeral is a captive audience and entitled to state protection from unwanted communication.

This Court has held that "the State is warranted in protecting individuals from unwanted communication that implicates certain privacy interests when the listener is somehow 'captive' to the message." *See Phelps v. Strickland*, 539 F.3d 356, 363 (6th Cir. 2008) (citing *Frisby v. Schultz*, 487 U.S. 474 (1988) (holding that a city could completely ban instrusive residential picketing

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(Cont'd)
in a commercial speech context. *See Florida Bar v. Went For It, Inc.*, 515 U.S. 618 (1995).

in order to protect residential privacy). In effect, the Court has recognized that the state has an interest in protecting the rights of individuals in situations where the "the degree of captivity makes it impractical for the unwilling viewer or auditor to avoid exposure." *Hill v. Colorado*, 530 U.S. 703, 718 (2000). Thus far, courts have applied the captive audience doctrine to uphold reasonable restrictions on speech where, for example, the communications at issue are directed to individuals in their homes, *see, e.g.*, *Frisby*, or "are so obtrusive that individuals cannot avoid exposure to them." *McQueary v. Stumbo*, 453 F. Supp. 2d 975, 990 (E.D. Ky. 2006); *see also Hill*, 530 U.S. at 732 (upholding, on the basis of the captive audience doctrine, a statute that prohibited the unwanted approach within eight feet of another person outside an abortion clinic "for the purpose of engaging in oral protest, eduction, or counseling").

However, a distinct split among the Federal Circuits has arisen as to whether and to what extent the captive audience doctrine applies in the context of funeral protests. In *Phelps v. Strickland*, the Sixth Circuit was asked to determine whether an Ohio statute imposing time and space limitations on protest activities was violative of the First Amendment. 539 F.3d at 359-60. The court specifically analyzed the question of whether "a state has a significant interest in protecting funeral attendees from unwanted communication." *Id.* at 362. Citing *Frisby* and *Hill*, the Sixth Circuit concluded that "[i]ndividuals mourning the loss of a loved one share a privacy right similar to individuals in their homes or individuals entering a medical facility," and that Ohio had an important interest in the protection of such individuals' privacy rights. *Id.* at 366. In reaching this conclusion, the court expressly acknowledged the important stake family members have in honoring and mourning their dead, and the fact that "mourners cannot easily avoid unwanted protests without sacrificing their right to partake in the funeral or burial service." *Id.*

In *Phelps v. Nixon*, 545 F.3d 685 (8th Cir. 2008), the Eighth Circuit Court of Appeals was confronted with a First Amendment challenge, ***by the same defendants***, to a Missouri statute that criminalized picketing "in front of or about" a funeral location or procession. However, despite a near identitity of the facts and issues with the *Strickland* case, the Court reached precisely the opposite conclusion. The court specifically determined that in the context of the First Amendment, an individual attending a funeral was different than an individual remaining in his home. *Phelps v. Nixon*, 545 F.3d at 692 (quoting *Olmer v. Lincoln*, 192 F.3d 1176, 1178 (8th Cir. 1999) (" '[T]he home is different,' and, in our view, unique. Allowing other locations, even churches, to claim the same level of consitutionally protected privacy would, we think, permit government to prohibit too much speech and other communication."). On this basis, the Eighth Circuit refused to extend the captive audience doctrine to protect the privacy interests of individuals outside of their homes.

In sum, no Circuit Court would dispute that Snyder had a privacy interest in attending his son's funeral without unwanted intrusion by Phelps. The question that requires further attention by this Court is whether Snyder's privacy interest as a captive audience prevails over Phelps' First Amendment right to free speech. Snyder contends that, as determined by the Sixth Circuit in *Phelps v. Strickland*, he was a captive audience because he could not avoid Phelps' protests. He had but one opportunity to mourn his son at the funeral service, and could not very well "turn his head" to avoid Phelps' malicious and targeted speech. At a minimum, the Eighth Circuit decision of *Phelps v. Nixon* raises the broader question of whether an individual can be a captive audience outside of his home.

In any event, presently, the Fourth Circuit gave no consideration to this issue whatsoever, but found Phelps' First Amendment rights to be an absolute bar to Snyder's claim for some compensation. This Court should undo the damage caused by the Fourth Circuit by appropriately defining the contours of the captive audience doctrine to include attendance at a family member's funeral.

CONCLUSION

For all of the foregoing reasons, Petitioner Albert Snyder respectfully requests that the Petition for a Writ of Certiorari be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT FILED SEPTEMBER 24, 2009

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 08-1026

ALBERT SNYDER,

Plaintiff-Appellee,

v.

FRED W. PHELPS, SR.; WESTBORO BAPTIST CHURCH, INCORPORATED; REBEKAH A. PHELPS-DAVIS; SHIRLEY L. PHELPS-ROPER,

Defendants-Appellants,

and

JANE DOE; JOHN DOE, JR.,

Defendants.

THOMAS JEFFERSON CENTER FOR THE PROTECTION OF FREE EXPRESSION; AMERICAN CIVIL LIBERTIES UNION; AMERICAN CIVIL LIBERTIES UNION OF MARYLAND,

Amici Supporting Appellants,

and

JEFFREY IRA SHULMAN,

Amicus Supporting Appellee.

Argued: December 2, 2008

Decided: September 24, 2009

Before KING, SHEDD, and DUNCAN,
Circuit Judges.

OPINION

KING, Circuit Judge:

In June 2006, Albert Snyder instituted this diversity action in the District of Maryland against Westboro Baptist Church, Incorporated (the "Church"), and several of its members (collectively, the "Defendants"). Snyder's lawsuit is predicated on two related events: a protest the Defendants conducted in Maryland near the funeral of Snyder's son Matthew (an enlisted Marine who tragically died in Iraq in March 2006), and a self-styled written "epic" (the "Epic") that the Defendants posted on the Internet several weeks after Matthew's funeral. Snyder's complaint alleged five state law tort claims, three of which are implicated in this appeal: invasion of privacy by intrusion upon seclusion, intentional infliction of emotional distress ("IIED"), and civil conspiracy. After a trial in October 2007, the jury found the Defendants liable for $2.9 million in compensatory damages and a total of $8 million in punitive damages. Although the district court remitted the aggregate punitive award to $2.1 million, it otherwise denied the post-trial motions. *See Snyder v. Phelps*, 533 F.Supp.2d 567 (D.Md.2008) (the "Post-Trial Opinion"). The Defendants have appealed, contending that the judgment contravenes the First Amendment of the Constitution. As explained below, we reverse on that basis.

I.

A.

The facts of this case as presented at trial are largely undisputed, and they are detailed in the district court's Post-Trial Opinion:

> On March 3, 2006, Marine Lance Corporal Matthew A. Snyder was killed in Iraq in the line of duty. Shortly thereafter, two United States Marines came to the home of the Plaintiff, Albert Snyder, and told him that his son had died. As Matthew Snyder had lived in Westminster, Maryland, and graduated from Westminster High School, St. John's Catholic Church in Westminster was selected as the site for his funeral, which was scheduled for March 10, 2006. Obituary notices were placed in local newspapers providing notice of the time and location of the funeral.

Defendant Fred W. Phelps, Sr., founded Defendant Westboro Baptist Church, Inc. in Topeka, Kansas, in 1955. For fifty-two years, he has been the only pastor of the church, which has approximately sixty or seventy members, fifty of whom are his children, grandchildren, or in-laws. Among these family members are Defendants Shirley L. Phelps-Roper and Rebekah A. Phelps-Davis. There are approximately ten to twenty members of the church who are not related to Phelps by blood or marriage. According to the testimony of Defendants' expert, the members of this church practice a "fire and brimstone" fundamentalist religious faith. Among their religious beliefs is that God hates homosexuality and hates and punishes America for its tolerance of homosexuality, particularly in the United States military. Members of the church have increasingly picketed funerals to assert these beliefs. Defendants have also established a website identified as www. godhatesfags. com in order to publicize their religious viewpoint.

Defendants' testimony at trial established that their picketing efforts gained increased attention when they began to picket funerals of soldiers killed in recent years. Members of the Phelps family prepare signs at an on-site sign shop at their Kansas church to take with them in their travels. They also utilize an on-site production facility to produce videos displayed on the church's website.

Phelps testified that members of the Westboro Baptist Church learned of Lance Cpl. Snyder's funeral and issued a news release on March 8, 2006, announcing that members of the Phelps family intended to come to Westminster, Maryland, and picket the funeral. On March 10, 2006, Phelps, his daughters Phelps-Roper and Phelps-Davis, and four of his grandchildren arrived in *212 Westminster, Maryland, to picket Matthew Snyder's funeral. None of the Defendants ever met any members of the Snyder family.

Defendants' rationale was quite simple. They traveled to Matthew Snyder's funeral in order to publicize their message of God's hatred of America for its tolerance of homosexuality. In Plaintiff's eyes, Defendants turned the funeral for his son into a "media circus for their benefit." By notifying police officials in advance, Defendants recognized that there would be a reaction in the community. They carried signs which expressed general messages such as "God Hates the USA," "America is doomed," "Pope in hell," and "Fag troops." The signs also carried more specific messages, to wit: "You're going to hell," "God hates you," "Semper fi fags," and "Thank God for dead soldiers." Phelps testified that it was Defendants' "duty" to deliver the message "whether they want to hear it or not." Lance Cpl. Snyder's funeral was thus utilized by Defendants as the vehicle for this message.

It was undisputed at trial that Defendants complied with local ordinances and police directions with respect to being a certain distance from the church. Furthermore, it was established at trial that Snyder did not actually see the signs until he saw a television program later that day with footage of the Phelps family at his son's funeral.

Defendants' utilization of Matthew Snyder's funeral to publicize their message continued after the actual funeral on March 10, 2006. After returning to Kansas, Phelps-Roper published an "epic" on the church's website, www. godhatesfags. com. In "The Burden of Marine Lance Cpl. Matthew Snyder," Phelps-Roper stated that Albert Snyder and his ex-wife "taught Matthew to defy his creator," "raised him for the devil," and "taught him that God was a liar." In the aftermath of his son's funeral, Snyder learned that there was reference to his son on the Internet after running a search on Google. Through the use of that search engine, he read Phelps-Roper's "epic" on the church's website.

Snyder v. Phelps, 533 F.Supp.2d 567, 571-72 (D.Md.2008) (internal citation omitted).[1]

B.

1.

When Albert Snyder filed his complaint in June 2006, he sued Fred W. Phelps, Sr., and the Church, later adding its members Shirley L. Phelps-Roper and Rebekah A. Phelps-Davis as defendants. The complaint alleged five state law tort claims: defamation, intrusion upon seclusion, publicity given to private life, IIED, and civil conspiracy. The Defendants moved for summary judgment on those claims, contending, inter alia, that their challenged words "constitute [ ] expressions of opinion, which are not actionable." J.A. 239.[2] They asserted that their words "are clearly rhetorical, hypothetical, religious and laced with opinion," and that "it is impossible to prove or disprove these things, particularly given that doctrinal viewpoints drive the opinions." *Id.*

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[1] The Defendants have a substantial history of protesting at venues other than soldiers' funerals. For example, on the day of Matthew Snyder's funeral, they also protested in Annapolis at the Maryland State House and at the Naval Academy. The Defendants have also been involved in litigation throughout the country relating to their protests. *See, e.g., Phelps-Roper v. Nixon*, 545 F.3d 685 (8th Cir.2008); *Phelps-Roper v. Strickland*, 539 F.3d 356 (6th Cir.2008). As a result of such activities, approximately forty states and the federal government have enacted legislation addressing funeral picketing. *See* Stephen R. McAllister, *Funeral Picketing Laws and Free Speech*, 55 U. Kan. L.Rev. 575, 576 (2007).

[2] Citations herein to "J.A. ____" refer to the contents of the Joint Appendix filed by the parties in this appeal.

On October 15, 2007, the district court granted summary judgment to the Defendants on two of the five tort claims: defamation and publicity given to private life.[3] The court awarded summary judgment on the defamation claim because the Defendants' speech was "essentially . . . religious opinion" and "would not realistically tend to expose Snyder to public hatred or scorn." ***Snyder***, 533 F.Supp.2d at 572-73. On the publicity given to private life claim, the court awarded summary judgment because the Defendants had not made public any private information. In so ruling, the court explained that the Defendants had published only information gleaned from a newspaper obituary and that such publication would not be highly offensive to a reasonable person, because the information was already a matter of public record.

In October 2007, the parties proceeded to trial on the remaining three claims of the complaint: intrusion upon seclusion, IIED, and civil conspiracy. At trial, Snyder testified, "recount[ing] fond memories of his son

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[3] Snyder has not cross-appealed the district court's summary judgment awards to the Defendants on his tort claims for defamation and publicity given to private life. Thus, whether the court erred in making those rulings is not implicated in this appeal.

... and the traumatic news of his passing." *Snyder*, 533 F.Supp.2d at 588. In its Post-Trial Opinion, the district court summarized Snyder's testimony:

> He described the severity of his emotional injury, stating that he is often tearful and angry, and that he becomes so sick to his stomach that he actually physically vomits. He testified that Defendants placed a "bug" in his head, such that he is unable to separate thoughts of his son from the [Defendants'] actions: "there are nights that I just, you know, I try to think of my son at times and every time I think of my son or pass his picture hanging on the wall or see the medals hanging on the wall that he received from the [M]arine [C]orps, I see those signs." He testified also that "I want so badly to remember all the good stuff and so far, I remember the good stuff, but it always turns into the bad."
>
> Plaintiff also testified as to the permanency of the emotional injury. He testified that "I think about the sign [i.e., Thank God for dead soldiers] every day of my life. . . . I see that sign when I lay in bed at nights. I [had] one chance to bury my son and they took the dignity away from it. I cannot re-bury my son. And for the rest of my life, I will remember what they did to me and it has tarnished the memory of my son's last hour on earth." He stated also that "somebody

> could have stabbed me in the arm or in the back and the wound would have healed. But I don't think this will heal."
>
> Throughout trial, Plaintiff demonstrated significant emotion, appearing visibly shaken and distressed, and was often reduced to tears. On occasion during the trial, Plaintiff requested and was granted leave from the courtroom to compose himself. The jury witnessed firsthand Plaintiff's anguish and the unresolved grief he harbors because of the failure to conduct a normal burial.

Id. at 588-89 (second and third alterations in original) (internal citations omitted).

Snyder called several expert witnesses to testify concerning the injuries the Defendants had caused him, including the worsening of his diabetes and severe depression. Snyder's treating physician confirmed that the Defendants' actions had exacerbated Snyder's depression, thereby preventing him from going through the normal grieving process. *See Snyder*, 533 F.Supp.2d at 588. Snyder's psychologist testified "that the demonstration and the things that [Plaintiff] talked about [seeing] in the website . . . have made the depression worse and lengthened it." *Id.* (alterations in original).

During the summary judgment proceedings and the trial, the Defendants repeatedly contended that the

First Amendment protects their actions.[4] In that regard, the district court recognized that certain signs carried by the Defendants-such as "America Is Doomed" and "God Hates America"—"express[ed] general points of view" that may have merited First Amendment protection. ***Snyder***, 533 F.Supp.2d at 578. But the court ruled that certain other signs-such as "Thank God for Dead Soldiers," "Semper Fi Fags," "You're Going to Hell," and "God Hates You"—created issues of fact for the jury because they "could be interpreted as being directed at the Snyder family." *Id.* Likewise, the court concluded that statements published in the Epic on the Church website "created similar issues to be addressed by the finder of fact." *Id.*

At trial, the Defendants challenged the propriety of the proposed jury instructions regarding the First Amendment.[5] During a hearing on jury instructions, the Defendants specifically objected to Instruction No. 21, which provided in full as follows:

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[4] The Free Speech Clause of the First Amendment specifically guarantees that "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I. The Free Speech Clause applies to the various states as a result of the Fourteenth Amendment. ***See Stromberg v. California***, 283 U.S. 359, 368, 51 S.Ct. 532, 75 L.Ed. 1117 (1931).

[5] In objecting to a proposed instruction on the intrusion upon seclusion claim, the Defendants sought to limit the jury's consideration to three specific signs. The trial court, however, authorized the jury to consider all of the signs as well as the Epic.

The Defendants in this case claim that their actions were protected by the First Amendment of the United States Constitution, which provides that Congress shall make no law . . . prohibiting the free exercise [of religion]; or abridging the freedom of speech. The Defendants have a right under the First Amendment to engage in picketing, and to publish their religious message, no matter how much you may disagree with that message. The First Amendment applies to action at the state and local level through the Fourteenth Amendment.

As a general matter, the fact that society may find speech offensive is not a sufficient reason for suppressing it. Speech that is called hateful, or speech that is unpopular, or speech with which you strongly disagree, may still be protected speech. The government, including the courts, can place reasonable time, place, and manner restrictions on how protected speech may be expressed. These restrictions must be narrowly tailored, and should balance the interests of all the people involved. Speech that is vulgar, offensive, and shocking . . . is not entitled to absolute constitutional protection under all circumstances.

The United States Supreme Court has long recognized that not all speech is of equal First Amendment protection. When speech gives rise to civil tort liability, the level of First Amendment protection varies depending on the nature and subject matter of the speech.

As to the particular subject matter of the speech, a distinction has been drawn between matters of public and private concern. Where the speech is directed at private people and matters of private concern, the Supreme Court has held that the First Amendment interest in protecting particular types of speech must be balanced against a state's interest in protecting its residents from wrongful injury. You must balance the Defendants' expression of religious belief with another citizen's right to privacy and his or her right to be free from intentional, reckless, or extreme and outrageous conduct causing him or her severe emotional distress. As I have previously indicated to you at the start of this case, you as the judges of the facts in this case must determine whether the Defendants' actions were directed specifically at the Snyder family. If you do so determine, you must then determine whether those actions would be highly offensive to a reasonable person, whether they were extreme and outrageous and whether these actions were so offensive and shocking as to not be entitled to First Amendment protection.

J.A. 3113-14 (alteration and omissions in original) (internal quotation marks omitted). In objecting to Instruction No. 21, the Defendants asserted that "the First Amendment has more of a heavy balance even in civil cases than just anybody not wanting to be offended." *Id.* at 2883. Phelps-Roper, who was defending herself on a pro se basis, further objected, stating: "I just want to say that ... it has never been clear in the record or to me what of our words are actionable and . . . [the court has] not limited the evidence to those words that you would say were directed to a specific family." *Id.* at 2884. The court overruled the objections to Instruction No. 21, observed that the constitutional issues were preserved, and gave the instruction to the jury.

2.

On October 31, 2007, the jury found for Snyder on the three tort claims, awarding him $2.9 million in compensatory damages and a total of $8 million in punitive damages. After the district court entered judgment on November 5, 2007, the Defendants filed post-trial motions seeking judgment as a matter of law, judgment notwithstanding the verdict, reconsideration and rehearing, a new trial, relief from judgment, and relief of law and equity. The district court denied each of these motions by its Post-Trial Opinion. The Defendants also moved for a remittitur, contending that the verdict was grossly excessive.

In its Post-Trial Opinion of February 4, 2008, the district court disposed of the Defendants' various legal challenges. The Post-Trial Opinion explained that this case "involves balancing [the Defendants' First Amendment rights of religious expression] with the rights of other private citizens to avoid being verbally assaulted by outrageous speech and comment during a time of bereavement." ***Snyder***, 533 F.Supp.2d at 579. As to the "content of the signs," the court was satisfied that it had "instructed the jury on the First Amendment, specifically the balance between Defendants' First Amendment rights and Maryland's interest in protecting its citizens," such that there "was sufficient evidence in the trial record for a reasonable jury to conclude that Defendants' conduct was so extreme and outrageous as to cause Plaintiff's injury." *Id.* at 581. The court also rejected the Defendants' post-trial contention that the court "should have held as a matter of law that [the Defendants] were entitled to First Amendment protection." *Id.* at 582. The court emphasized that it had permitted the jury to decide if the Defendants' conduct was sufficient to hold them liable on the three Maryland tort claims, and the jury had found the Defendants liable. *See id.* at 580-82.

Finally, by its Post-Trial Opinion, the district court upheld the compensatory damages award but remitted the punitive damages award to a total of $2.1 million, resulting in an aggregate judgment of $5 million. The

Defendants have now appealed, and we possess jurisdiction pursuant to 28 U.S.C. § 1291.[6]

II.

The Defendants' primary appellate contention is that the judgment contravenes the First Amendment. In addition to their First Amendment contentions, the Defendants raise the following other issues: that the district court lacked personal and subject matter jurisdiction; that Snyder had no privacy right in Matthew's funeral; that the punitive damages award contravenes due process; that the jury was impermissibly biased; that the district court made prejudicial evidentiary errors at trial; that the civil conspiracy verdict is inconsistent with state law; and that Maryland's statutory cap on compensatory damages applies to the damages award. We are content to reject each of these non-First Amendment contentions without further discussion because they are all plainly without merit.[7]

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[6] Each of the Defendants requested a stay of execution of judgment pending appeal, which the district court conditionally granted. Phelps and the Church were then required to post property bonds, and Phelps-Roper and Phelps-Davis had to post substantial cash bonds. On May 19, 2008, we denied the requests of Phelps-Roper and Phelps-Davis to stay the judgment without bond pending appeal.

[7] The Defendants also assert on appeal that we improperly denied the requests of Phelps-Roper and Phelps-Davis to stay the judgment without bond pending appeal. As explained below, we discharge the various bonds as a corollary to reversing the judgment.

Notably, the Defendants do *not* challenge the sufficiency of the evidence, although an amicus brief seeks to raise that issue. Our good colleague Judge Shedd would reverse the judgment against the Defendants on the issue of evidence sufficiency that is asserted only by the amicus submission. In that respect, we agree that, although the Defendants properly raised the sufficiency issue in the district court, they have abandoned that contention on appeal. Thus, the Defendants and their counsel have exercised their discretion and voluntarily waived the sufficiency issue. Notwithstanding such waiver, however, Judge Shedd would reverse the judgment because he agrees with the amicus that the supporting evidence was insufficient.

We respectfully reject our good friend's reliance on the amicus contention, because the evidentiary issue has plainly been waived by the only party entitled to pursue it. As a result, the First Amendment contention must be addressed. Put simply, our Court and our sister circuits have consistently been wary, even prohibitive, of addressing an issue raised solely by an amicus. *See United States v. Buculei*, 262 F.3d 322, 333 n. 11 (4th Cir.2001) (" 'An issue waived by appellant cannot be raised by amicus curiae.' ") (quoting *Christopher M. v. Corpus Christi Indep. Sch. Dist.*, 933 F.2d 1285, 1293 (5th Cir.1991)); *Cavallo v. Star Enter.*, 100 F.3d 1150, 1152 n. 2 (4th Cir.1996) (declining to address issue not raised in opening brief, as it would be "unfair to the appellee and would risk an improvident or ill-advised opinion on the legal issues" (internal quotation marks omitted)). Indeed, " '[a]n appellant and an amicus may not split up the issues and expect the court to consider that they have all been raised on appeal.' " *Buculei*, 262 F.3d at 333 n. 11 (quoting *Amoco Oil Co. v. United States*, 234 F.3d 1374, 1378 (Fed.Cir.2000)). *But see Spicer v. Hilton*, 618 F.2d 232, 240 (3d Cir.1980) (concluding that constitutional issues should yield to nonconstitutional ones, even where nonconstitutional issues were not raised by parties). As the Federal Circuit has aptly described such a situation, "[i]t is the appellant's case, not a joint appeal by the appellant and amicus. Appellant must raise in its opening brief all the issues it wishes the court to address." *Amoco Oil*, 234 F.3d at 1378.

On the other hand, we acknowledge that the Supreme Court has seen fit, in narrow and circumscribed circumstances of its own choosing, to address and dispose of an issue raised solely by an amicus. *See Teague v. Lane*, 489 U.S. 288, 300, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989) (addressing retroactivity issue on appeal because "th[e] question is not foreign to the parties," who addressed retroactivity with respect to another claim); *see also Davis v. United States*, 512 U.S. 452, 457 n. * (1994) (recognizing that Supreme Court may assess contentions raised only in amicus brief, but declining to do so). With all respect to the Supreme Court's treatment of the waiver issue in *Teague* and *Davis*, this situation does not warrant an exception to our post- *Teague* circuit precedent.[8] Because the

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[8] In this regard, we further observe that recognition of the right of an amicus to present an issue that the parties have

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Defendants have voluntarily waived any contention that the evidence is insufficient to support the verdict, we are obligated to grapple with and resolve the First Amendment issues presented by the judgment.[9]

III.

With respect to the First Amendment issue, the Defendants maintain that they were entitled to judgment as a matter of law because the First Amendment fully protects their speech at the Maryland protest and in the written Epic they published on the Internet. We will first address the Defendants' assertion that the court erroneously permitted the jury to decide legal issues reserved to the court. Such an error would garner the Defendants a new trial, but there is no need for a new trial if the Defendants were entitled to prevail

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no desire to further litigate would constitute judicial recognition of a lawyer relief rule-inviting lawyers and nonparties otherwise without standing to seek out and engage in mischief that would readily be likened to barratry, champerty, or maintenance.

[9] Because the sufficiency of the evidence issue was waived, the *Ashwander* principle-that a court should not "decide questions of a constitutional nature unless absolutely necessary"-is inapplicable here. *See Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 347, 56 S.Ct. 466, 80 L.Ed. 688 (1936) (Brandeis, J., concurring) (internal quotation marks omitted). The resolution of the First Amendment issues is absolutely necessary, as it is the sole appropriate means for disposing of this appeal.

under the First Amendment. Thus, after describing the general legal frame-work applicable here, we specifically address the application of that legal framework to the Defendants' various protest signs and their written Epic.

A.

It is well established that tort liability under state law, even in the context of litigation between private parties, is circumscribed by the First Amendment. *See New York Times Co. v. Sullivan*, 376 U.S. 254, 264-65, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964).[10] Although the Supreme Court in New York Times specifically addressed the common law tort of defamation, the Court explained that its reasoning did not turn on the precise "form in which state power has been applied." *Id.* at 265, 84 S.Ct. 710. Accordingly, the Court later applied the First Amendment to other torts not involving reputational damages, *see Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 53, 108 S.Ct. 876, 99 L.Ed.2d 41 (1988) (IIED), and we have applied the Court's controlling principles to other state law torts, *see Food*

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[10] The district court properly distinguished these proceedings, where the Defendants contend that the First Amendment immunizes them from tort liability, from other decisions relied on by the Defendants addressing the constitutionality of *statutory* prohibitions affecting funeral pickets. *See Snyder v. Phelps*, 533 F.Supp.2d 567, 578-79 (D.Md.2008) (distinguishing certain "successful attacks by the [Defendants] upon *statutory* restrictions" that have not met constitutional muster).

Lion v. Capital Cities/ABC, Inc., 194 F.3d 505, 511, 522 (4th Cir.1999) (fraud, breach of duty of loyalty, and trespass). Thus, regardless of the specific tort being employed, the First Amendment applies when a plaintiff seeks damages for reputational, mental, or emotional injury allegedly resulting from the defendant's speech. *See id.* at 523.[11]

Where, as here, the First Amendment is implicated by the assertion of tort claims arising from speech, we have the obligation "to 'make an independent examination of the whole record' in order to make sure that 'the judgment does not constitute a forbidden intrusion on the field of free expression.' " *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 499, 104 S.Ct. 1949, 80 L.Ed.2d 502 (1984) (quoting *New York Times*, 376 U.S. at 284-86, 84 S.Ct. 710); *see also Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 21, 110 S.Ct. 2695, 111 L.Ed.2d 1 (1990) (referring to the review required by Bose Corp. as "enhanced appellate review"). We review de novo a district court's conclusions of law with respect to a First Amendment issue. *See United States v. Bly*, 510 F.3d 453, 457 (4th Cir.2007).

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[11] The Supreme Court has deemed the First Amendment defense inapplicable to a state law tort claim only when the plaintiff seeks damages for actual pecuniary loss, as opposed to injury to reputation or state of mind. *See Cohen v. Cowles Media Co.*, 501 U.S. 663, 671, 111 S.Ct. 2513, 115 L.Ed.2d 586 (1991) (concluding that First Amendment did not bar economic damages resulting from defendant's tortious breach of promise).

In its *New York Times* decision, the Supreme Court established a rule barring public officials from recovering damages for the common law tort of defamation unless the allegedly defamatory statement was made with "actual malice," and the Court defined such malice as knowing falsity or reckless disregard for the truth. 376 U.S. at 279-80, 84 S.Ct. 710. The Court later expanded that constitutional standard to speech concerning "public figures" as well as "public officials," *Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 164, 87 S.Ct. 1975, 18 L.Ed.2d 1094 (1967) (Warren, C.J., concurring in the result), but stopped short of extending its protective rule to speech targeting private figures, *see Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 344-46, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974).

Nevertheless, in a distinct but related line of decisions, the Court has recognized that there are constitutional limits on the *type* of speech to which state tort liability may attach. *See Milkovich*, 497 U.S. at 16, 110 S.Ct. 2695; *Hustler Magazine*, 485 U.S. at 50, 108 S.Ct. 876; *see also Deupree v. Iliff*, 860 F.2d 300, 304-05 (8th Cir.1988) (recognizing that certain types of speech are protected regardless of plaintiff's status as private or public figure). Thus, although there is no categorical constitutional defense for statements of "opinion," the First Amendment will fully protect "statements that cannot 'reasonably [be] interpreted as stating actual facts' about an individual." *Milkovich*, 497 U.S. at 20, 110 S.Ct. 2695 (alteration in original) (quoting *Hustler Magazine*, 485 U.S. at 50, 108 S.Ct. 876).[12]

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[12] There is no suggestion that the speech at issue falls within one of the categorical exclusions from First Amendment

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In *Milkovich*, which is a crucial precedent in our disposition of this appeal, the Supreme Court declined to adopt an artificial dichotomy between "opinion" and "fact," and it specifically eschewed the multifactor tests that several lower courts (including this Court) had utilized to categorize speech. *See* 497 U.S. at 19, 110 S.Ct. 2695; *see also Biospherics, Inc. v. Forbes, Inc.*, 151 F.3d 180, 183-84 (4th Cir.1998) (explaining that *Milkovich* rejected our multifactor test). In *Milkovich*, the Court assessed whether a newspaper enjoyed First Amendment protection for a column that referred to a wrestling coach as a "liar," based on his allegedly deceitful testimony before a state athletics council. 497 U.S. at 4-5 & n. 2, 110 S.Ct. 2695. The newspaper maintained that the column merely stated its author's opinion, and was thus subject to categorical First Amendment protection. *Id.* at 17-18, 110 S.Ct. 2695. The Court rejected this contention, ruling instead that the "dispositive question" was "whether a reasonable factfinder could conclude that the statements in the [newspaper] column imply an assertion that [the coach] perjured himself in a judicial proceeding." *Id.* at 21, 110 S.Ct. 2695. Concluding that the column's assertions were "susceptible of being proved true or false," the Court determined that they were not protected by the First Amendment. *Id.*

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protection, such as those for obscenity or "fighting words." *See, e.g.*, *Miller v. California*, 413 U.S. 15, 20, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72, 62 S.Ct. 766, 86 L.Ed. 1031 (1942).

In light of *Milkovich*, and as carefully explained by Judge Motz in our Biospherics decision, we are obliged to assess how an objective, reasonable reader would understand a challenged statement by focusing on the plain language of the statement and the context and general tenor of its message. *See Biospherics*, 151 F.3d at 184. And we must emphasize the "verifiability of the statement," because a statement not subject to objective verification is not likely to assert actual facts. *Chapin v. Knight-Ridder, Inc.*, 993 F.2d 1087, 1093 (4th Cir.1993); *see also Haynes v. Alfred A. Knopf, Inc.*, 8 F.3d 1222, 1227 (7th Cir.1993) ("[I]f it is plain that the speaker is expressing a subjective view, an interpretation, a theory, conjecture, or surmise, rather than claiming to be in possession of objectively verifiable facts, the statement is not actionable.").

There are two subcategories of speech that cannot reasonably be interpreted as stating actual facts about an individual, and that thus constitute speech that is constitutionally protected. First, the First Amendment serves to protect statements on matters of public concern that fail to contain a "provably false factual connotation." *Milkovich*, 497 U.S. at 20, 110 S.Ct. 2695.[13]

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[13] Neither the Supreme Court nor this Court has specifically addressed the question of whether the constitutional protections afforded to statements not provably false should apply with equal force to both media and nonmedia defendants. *See Milkovich*, 497 U.S. at 20 n. 6, 110 S.Ct. 2695. The Second and Eighth Circuits, however, have rejected any media/nonmedia distinction. *See Flamm v. Am. Ass'n of Univ. Women*,

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We assess as a matter of law whether challenged speech involves a matter of public concern by examining the content, form, and context of such speech, as revealed by the whole record. *See Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 761, 105 S.Ct. 2939, 86 L.Ed.2d 593 (1985). "Speech involves a matter of public concern when it involves an issue of social, political, or other interest to a community." *Kirby v. City of Elizabeth City, N.C.*, 388 F.3d 440, 446 (4th Cir.2004).[14]

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201 F.3d 144, 149 (2d Cir.2000); *In re IBP Confidential Bus. Documents Litig.*, 797 F.2d 632, 642 (8th Cir.1986); *see also Foretich v. Capital Cities/ABC, Inc.*, 37 F.3d 1541, 1563 n. 39 (4th Cir.1994) (implying in dicta that Milkovich applies equally to media and nonmedia defendants). Like those two circuits, we believe that the First Amendment protects nonmedia speech on matters of public concern that does not contain provably false factual assertions. Any effort to justify a media/nonmedia distinction rests on unstable ground, given the difficulty of defining with precision who belongs to the "media." And, more importantly, the Supreme Court has concluded that the "inherent worth of speech . . . does not depend upon the identity of its source, whether corporation, association, union, or individual." *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 777, 98 S.Ct. 1407, 55 L.Ed.2d 707 (1978). Thus, for our purposes, the status of the Defendants as media or nonmedia is immaterial.

[14] In our *Kirby* decision, we assessed whether the words at issue involved a matter of public concern in the context of a public employment retaliation action. *See* 388 F.3d at 444. Both the Supreme Court and the courts of appeals have borrowed from that context for purposes of analyzing tort liability under the First Amendment. *See, e.g.*, *Dun & Bradstreet*, 472 U.S. at 759, 105 S.Ct. 2939; *Levinsky's, Inc. v. Wal-Mart Stores, Inc.*, 127 F.3d 122, 132 (1st Cir.1997).

In order to be treated as speech involving a matter of public concern, the interested community need not be especially large nor the relevant concern of "paramount importance or national scope." *Levinsky's, Inc. v. Wal-Mart Stores, Inc.*, 127 F.3d 122, 132 (1st Cir.1997).

Second, rhetorical statements employing "loose, figurative, or hyperbolic language" are entitled to First Amendment protection to ensure that "public debate will not suffer for lack of 'imaginative expression' or the 'rhetorical hyperbole' which has traditionally added much to the discourse of our Nation." *Milkovich*, 497 U.S. at 20-21, 110 S.Ct. 2695. The general tenor of rhetorical speech, as well as the use of "loose, figurative, or hyperbolic language" sufficiently negates any impression that the speaker is asserting actual facts. *Id.* at 21, 110 S.Ct. 2695; *see also Letter Carriers v. Austin*, 418 U.S. 264, 284-86, 94 S.Ct. 2770, 41 L.Ed.2d 745 (1974) (concluding that reference to worker who crossed picket line as "traitor" was not actionable); *Greenbelt Coop. Publ'g Ass'n v. Bresler*, 398 U.S. 6, 13-14, 90 S.Ct. 1537, 26 L.Ed.2d 6 (1970) (treating description of negotiating position as "blackmail" as epithet not conveying commission of actual crime). We assess as a matter of law whether speech contains rhetorical hyperbole protected by the First Amendment. *See CACI Premier Tech., Inc. v. Rhodes*, 536 F.3d 280, 294 (4th Cir.2008).

We had occasion to apply these legal principles just last year in our *CACI* decision. *See* 536 F.3d at 293. CACI was a civilian defense contractor that performed interrogation services for the military at Abu Ghraib prison in Iraq. CACI claimed that it had been defamed by a talk radio host who had made on-air statements blaming CACI for the mistreatment of detainees at the prison and criticizing the use of wartime contractors in general. *See id.* at 288-92. Judge Michael's opinion affirmed the summary judgment award to the radio host, based in part on the determination that her statements were protected by the First Amendment because they "did not state actual facts about CACI." *Id.* at 304.[15]

The radio host, for example, had claimed that CACI and other defense contractors employed "[m]ercenaries all over the country, killing people," and she had characterized CACI and other contractors as "hired killers." *CACI*, 536 F.3d at 301 (alteration in original). Judge Michael explained that no reasonable listener would understand the challenged statements to assert actual facts about CACI, but rather would understand them as "exaggerated rhetoric intended to spark the debate about the wisdom of the use of contractors in Iraq." *Id.* at 301-02. The radio host had twice mentioned that certain individuals working for contractors in Iraq fought for apartheid in South Africa. *See id.* at 302. Those statements also could not reasonably be interpreted as stating actual facts about CACI: they were properly

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15. The *CACI* opinion also concluded that other statements made by the radio host were protected by the First Amendment because they were not made with "actual malice," as defined in the New York Times decision, i.e., those statements had not been made with knowing falsity or reckless disregard for the truth. *See CACI*, 536 F.3d at 294-300.

understood as referring to individual employees of the contractors, as opposed to the contractors themselves, and the host had simply used "loose and hyperbolic terms" to press her case against the government's use of military contractors. *Id.*

B.

In this proceeding, Snyder was awarded judgment against the Defendants on three of the tort claims asserted in the Amended Complaint: intrusion upon seclusion, IIED, and civil conspiracy. By these claims, Snyder sought damages for injuries to his state of mind only, and not for pecuniary loss. Thus, the verdict in favor of Snyder can only be sustained if it is consistent with the Defendants' First Amendment guarantees. *See Food Lion*, 194 F.3d at 522 (foreclosing any attempt to recover damages under "non-reputational tort claims, without satisfying the stricter (First Amendment) standards of a defamation claim"). As explained below, the Defendants correctly contend that the district court erred in permitting the jury to decide legal issues reserved to the court, and then by denying the Defendants' request for judgment as a matter of law.

1.

Assuming that the district court otherwise applied the proper legal standards to its analysis of the Defendants' First Amendment contentions, it fatally erred by allowing the jury to decide relevant legal issues. Instruction No. 21, to which Defendants carefully objected at trial, explained to the jury that certain speech, including that which is "vulgar, offensive, and shocking," is not entitled to "absolute constitutional protection." J.A. 3113. It also explained that the protections accorded under the First Amendment vary with the "nature and subject matter of the speech," and the instruction suggested that, when speech on matters of private concern is directed at private figures, the First Amendment "must be balanced against" the state's interest in protecting its citizens. *Id.* at 3114.

The district court thus decided that it was for the jury—not the court—to assess the preliminary issue of the nature of the speech involved, and to then decide whether such speech was protected by the Free Speech Clause. Thus, the jury was erroneously tasked with deciding whether the Defendants' speech was "directed specifically at the Snyder family," and, if so, whether it was so "offensive and shocking as to not be entitled to First Amendment protection." J.A. 3114; *see also id.* ("You must balance the Defendants' expression of religious belief with another citizen's right to privacy and his or her right to be free from intentional, reckless, or extreme and outrageous conduct causing him or her severe emotional distress."). At the least, therefore, the judgment must be vacated and a new trial awarded, in that Instruction No. 21 authorized the jury to determine a purely legal issue, namely, the scope of protection afforded to speech under the First Amendment.[16]

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[16] The Post-Trial Opinion confirms that the jury assessed legal issues that were reserved to the court. *See Snyder*, 533 F.Supp.2d at 578 ("While signs expressing general points of view

(Cont'd)

As previously noted, however, a new trial is unnecessary if the Defendants can prevail as a matter of law after our independent examination of the whole record. *See Milkovich*, 497 U.S. at 17, 110 S.Ct. 2695. We are thus obliged to apply the applicable legal framework to the Defendants' various protest signs and written Epic, and decide if the Defendants are entitled to judgment as a matter of law.

2.

The district court also erred when it utilized an incorrect legal standard in its Post-Trial Opinion. In assessing the Defendants' First Amendment contentions, the court focused almost exclusively on the Supreme Court's opinion in *Gertz*, which it read to limit the First Amendment's protections for "speech directed by private individuals against other private individuals." *Snyder v. Phelps*, 533 F.Supp.2d 567, 577 (D.Md.2008). The court therefore assessed whether Snyder was a "public figure" under *Gertz* and whether Matthew's funeral was a "public event." *See id.*[17]

(Cont'd)

are afforded First Amendment protection, [certain] additional signs, which could be interpreted as being directed at the Snyder family, created issues for the finder of fact."). Thus, the district court permitted the jury to determine the nature of the speech (i.e., as containing assertions of actual fact specifically directed at and concerning the Snyders), and indicated that the jury should decide whether the signs should be afforded First Amendment protection.

[17] The district court failed to distinguish between Snyder and his deceased son for purposes of the "public figure"

(Cont'd)

The Supreme Court has created a separate line of First Amendment precedent that is specifically concerned with the constitutional protections afforded to certain *types* of speech, and that does not depend upon the public or private status of the speech's target. *See Milkovich*, 497 U.S. at 16, 110 S.Ct. 2695; *Hustler Magazine*, 485 U.S. at 50, 108 S.Ct. 876. Thus, even if the district court (as opposed to the jury) concluded that Snyder and his son were not "public figures," such a conclusion alone did not dispose of the Defendants' First Amendment contentions. In focusing solely on the status of the Snyders and the funeral, and not on the legal issue concerning the nature of the speech at issue, the court failed to assess whether the pertinent statements could reasonably be interpreted as asserting "actual facts" about an individual, or whether they instead merely contained rhetorical hyperbole. *See Milkovich*, 497 U.S. at 20, 110 S.Ct. 2695; *CACI*, 536 F.3d at 293. Whether a statement can reasonably be interpreted as stating actual facts about an individual is a question of law for the court, *see CACI*, 536 F.3d at 293-94, and the district court failed to consider that issue in its Post-Trial Opinion. Consequently, we must assess the content of the Defendants' protest signs as well as the Epic, and determine whether such speech is entitled to constitutional protection.

(Cont'd)

analysis. *See Snyder*, 533 F.Supp.2d at 577. Because the speech at issue cannot reasonably be interpreted as stating actual facts about *any* individual, we need not decide whether the court should have drawn a distinction.

a.

The following signs displayed by the Defendants, which are similar in both their message and syntax, can readily be assessed together: "America is Doomed," "God Hates the USA/Thank God for 9/11," "Pope in Hell," "Fag Troops," "Semper Fi Fags," "Thank God for Dead Soldiers," "Don't Pray for the USA," "Thank God for IEDs," "Priests Rape Boys," and "God Hates Fags."[18] As a threshold matter, as utterly distasteful as these signs are, they involve matters of public concern, including the issue of homosexuals in the military, the sex-abuse scandal within the Catholic Church, and the political and moral conduct of the United States and its citizens. Such issues are not subjects of "purely private concern," *Dun & Bradstreet*, 472 U.S. at 759, 105 S.Ct. 2939, but rather are issues of social, political, or other interest to the community, *see, e.g., Acanfora v. Bd. of Educ. of Montgomery County*, 491 F.2d 498, 500-01 (4th Cir.1974) (holding that speech concerning homosexuality was matter of public concern). As explained in one of the amicus submissions, for example, a public firestorm erupted in 2001 after two prominent religious figures,

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[18] The district court did not specifically discuss four of these signs ("Don't Pray for the USA," "Thank God for IEDs," "Priests Rape Boys," and "God Hates Fags") in its Post-Trial Opinion. It also did not mention other signs displayed at the funeral-those reading "Maryland Taliban," "Fags Doom Nations," and "Not Blessed Just Cursed"-that further support our conclusion that the signs contained generally directed rhetorical hyperbole, and not actual, provable facts about Snyder or his son.

Jerry Falwell and Pat Robertson, alleged that the September 11th terrorist attacks represented God's punishment for our country's attitudes regarding homosexuality and abortion. *See* John F. Harris, "God Gave U.S. 'What We Deserve,' Falwell Says," Wash. Post, Sept. 14, 2001, at C3.

Additionally, no reasonable reader could interpret any of these signs as asserting actual and objectively verifiable facts about Snyder or his son. The signs reading "God Hates the USA/Thank God for 9/11" and "Don't Pray for the USA," for example, are not concerned with any individual, but rather with the nation as a whole. Other signs (those referring to "fags," "troops," and "dead soldiers") use the plural form, which would lead a reasonable reader to conclude that the speaker is referring to a group rather than an individual. Additional signs are concerned with individuals, such as the Pope, who are entirely distinct from Snyder and his son, or with groups, such as priests, to which neither Snyder nor his son belong. Finally, those signs stating "Thank God for Dead Soldiers" and "Thank God for IEDs" only constitute a reference to Snyder's son if the reader makes the assumption that their only object is Matthew Snyder and not the thousands of other soldiers who have died in Iraq and Afghanistan, often as a result of IEDs.

Even if the language of these signs could reasonably be read to imply an assertion about Snyder or his son, the statements are protected by the Constitution for two additional reasons: they do not assert provable facts about an individual, and they clearly contain imaginative and hyperbolic rhetoric intended to spark debate about issues with which the Defendants are concerned. *See CACI*, 536 F.3d at 301. Whether "God hates" the United States or a particular group, or whether America is "doomed," are matters of purely subjective opinion that cannot be put to objective verification. The statement "Thank God," whether taken as an imperative phrase or an exclamatory expression, is similarly incapable of objective verification. And, as heretofore explained, a reasonable reader would not interpret the signs that could be perceived as including verifiable facts, such as "Fag Troops" and "Priests Rape Boys," as asserting actual facts *about* Snyder or his son. To the contrary, these latter statements, as well as others in this category, consist of offensive and hyperbolic rhetoric designed to spark controversy and debate. By employing God, the strong verb "hate," and graphic references to terrorist attacks, the Defendants used the sort of "loose, figurative, or hyperbolic language" that seriously negates any impression that the speaker is asserting actual facts about an individual. *Milkovich*, 497 U.S. at 21, 110 S.Ct. 2695. Accordingly, we are constrained to agree that these signs—"America is Doomed," "God Hates the USA/Thank God for 9/11," "Pope in Hell," "Fag Troops," "Semper Fi Fags," "Thank God for Dead Soldiers," "Don't Pray for the USA," "Thank God for IEDs," "Priests Rape Boys," and "God Hates Fags"—are entitled to First Amendment protection.

b.

The reasonable reader's reaction to two other signs—"You're Going to Hell" and "God Hates You"-also must be specifically addressed, as these two signs present a closer question. We must conclude, however, that these two signs cannot reasonably be interpreted as stating actual facts about any individual. The meaning of these signs is ambiguous because the pronoun "you" can be used to indicate either the second person singular or plural form.[19] A reasonable reader could interpret these signs, therefore, as referring to Snyder or his son only, or, on the other hand, to a collective audience (or even the nation as a whole).

We need not resolve this question of usage, however, because a reasonable reader would not interpret the statements on these two signs as asserting actual and provable facts. Whether an individual is "Going to Hell" or whether God approves of someone's character could not possibly be subject to objective verification. Thus, even if the reasonable reader understood the "you" in these signs to refer to Snyder or his son, no such reader would understand those statements ("You're Going to Hell" and "God Hates You") to assert provable facts about either of them.

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[19] Historically, the pronoun "you" was used only in the plural form; the word "thou" was used to refer to a single person. *See Webster's Third New International Dictionary* 2380-81 (1976).

Additionally, as with the other signs, both of these signs contain strong elements of rhetorical hyperbole and figurative expression. As we have recognized, the "context and tenor" of the speech at issue, as well as the speaker's use of "irreverent and indefinite language," can serve to negate any impression that he is asserting actual facts about an individual. *Biospherics*, 151 F.3d at 184-85. The general context of the speech in this proceeding is one of impassioned (and highly offensive) protest, with the speech at issue conveyed on handheld placards. A distasteful protest sign regarding hotly debated matters of public concern, such as homosexuality or religion, is not the medium through which a reasonable reader would expect a speaker to communicate objectively verifiable facts. In addition, the words on these signs were rude, figurative, and incapable of being objectively proven or disproven. Given the context and tenor of these two signs, a reasonable reader would not interpret them as asserting actual facts about either Snyder or his son.

c.

Finally, the written Epic published on the website of the Church is also protected by the First Amendment, in that a reasonable reader would understand it to contain rhetorical hyperbole, and not actual, provable facts about Snyder and his son. The First Amendment issue concerning the Epic presents a somewhat more difficult question, however, because it is entitled "The Burden of Marine Lance Cpl. Matthew A. Snyder." J.A. 3788. Such a title could lead a reasonable reader to initially conclude that the Epic asserts facts about this particular soldier. The Epic's subtitle, however, immediately connects its contents to the Defendants' protest and the various signs displayed there: "The Visit of Westboro Baptist Church to Help the Inhabitants of Maryland Connect the Dots! This Epic Adventure Took Place on Friday, March 10, 2006." *Id.* The Epic has a photograph of the funeral protest immediately below its title, followed by nearly two pages of verbatim Bible verses. *Id.* at 3788-89.

The Epic then discusses Matthew's life: "Twenty years ago, little Matthew Snyder came into the world. . . . God created him and loaned/entrusted him to Albert and Julie Snyder." J.A. 3790. The Epic states that the Snyders "had a DUTY to prepare that child to serve the LORD his GOD—PERIOD! You did JUST THE OPPOSITE—you raised him for the devil. You taught him that God was a liar." *Id.* at 3791. The Epic also focuses on Matthew's upbringing, asserting that "Albert and Julie . . . taught Matthew to defy his Creator, to divorce, and to commit adultery. They taught him how to support the largest pedophile machine in the history of the entire world, the Roman Catholic monstrosity. . . . They also, in supporting satanic Catholicism, taught Matthew to be an idolater." *Id.* After interspersing additional excerpts from the Bible, the Epic refers to Matthew's service in the military, noting that he fought for

> the United States of Sodom, a filthy country that is in lock step with his evil, wicked[,] and sinful manner of life, putting him in the cross

> hairs of a God that is so mad He has smoke coming from his nostrils and fire from his mouth! How dumb was that?

Id. The Epic then links Matthew's death to the Defendants' protest activities, stating:

> God rose up Matthew for the very purpose of striking him down, so that God's name might be declared throughout all the earth. He killed Matthew so that His servants would have an opportunity to preach His words to the U.S. Naval Academy at Annapolis, the Maryland Legislature, and the whorehouse called St. John Catholic Church at Westminster where Matthew Snyder fulfilled his calling.

Id. at 3973.

Notwithstanding the foregoing, the Epic cannot be divorced from the general context of the funeral protest. Indeed, it is patterned after the hyperbolic and figurative language used on the various signs. Again, in assessing the First Amendment issue, we must evaluate a reasonable reader's reaction to the Epic, in light of its context and general tenor. *See Biospherics*, 151 F.3d at 184-85. In context, the Epic is a recap of the protest and was distributed through the Church website, which would not lead the reasonable reader to expect actual facts about Snyder or his son to be asserted therein.

The general tenor of the Epic also serves to negate any impression that it was the source of any actual facts. In preparing it, the Defendants interspersed strong, figurative language with verses from the Bible. They utilized distasteful and offensive words, atypical capitalization, and exaggerated punctuation, all of which suggest the work of a hysterical protestor rather than an objective reporter of facts. Despite referring to the Snyder family by name, the Epic is primarily concerned with the Defendants' strongly held views on matters of public concern. Indeed, the Epic explains that Matthew's death in Iraq gave the Defendants the "opportunity to preach [God's] words to the U.S. Naval Academy at Annapolis [and] the Maryland Legislature," J.A. 3973, where they protested on the very day of Matthew's funeral. Finally, the Defendants' extensive funeral picketing activities predated Matthew's funeral and continue to this day throughout the country, with many of the signs displayed at Matthew's funeral also being displayed in other protests.

Thus, even when the Snyders are mentioned in the Epic, a reasonable reader would understand its contents to be primarily focused on the more general message to which their protests are directed. The Defendants assert in the Epic, for example, that the Snyders had incurred God's wrath by raising Matthew as a Catholic and allowing him to serve in the military-assertions a reasonable reader would take as focused on the Defendants' concerns with the policies and activities of the Roman Catholic Church and the military. Furthermore, a reasonable reader would take as rhetorically hyperbolic a text describing the "United States of Sodom" as a "filthy" country, labelling the Catholic Church as a "pedophile machine," and equating the Maryland Legislature with the Taliban. In that context, the reasonable reader would understand the other assertions of the Epic—that the Snyders raised their son "for the devil," and taught him to "defy his Creator, to divorce, and to commit adultery"—as simply "loose, figurative, or hyperbolic language" not connoting actual facts about Matthew or his parents. *Milkovich*, 497 U.S. at 21, 110 S.Ct. 2695. Thus, a reasonable reader would not understand the Epic to assert actual facts about either Snyder or his son.[20]

C.

Notwithstanding the distasteful and repugnant nature of the words being challenged in these proceedings, we are constrained to conclude that the Defendants' signs and Epic are constitutionally protected. To paraphrase our distinguished colleague Judge Hall, judges defending the Constitution "must sometimes share [their] foxhole with scoundrels of every sort, but to abandon the post because of the poor company is to sell freedom cheaply. It is a fair summary of history to say that the safeguards of liberty have often been forged in controversies involving not very nice people." *Kopf v. Skyrm*, 993 F.2d 374, 380 (4th Cir.1993) (internal quotation marks omitted).

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[20] 20. The district court recognized the nonfactual basis of the Epic when it dismissed Snyder's defamation claim. In so ruling, the court observed that the statements found therein were "essentially [the Defendants'] religious opinion and would not realistically tend to expose Snyder to public hatred or scorn." *Snyder*, 533 F.Supp.2d at 572-73.

Nonetheless, the various states and localities, as well as grieving families, may yet protect the sanctity of solemn occasions such as funerals and memorials. Indeed, governmental bodies are entitled to place reasonable and content-neutral time, place, and manner restrictions on activities that are otherwise constitutionally protected. Some "breathing space" for contentious speech is essential, however, under the Free Speech Clause. *See New York Times*, 376 U.S. at 272, 84 S.Ct. 710. As the Court long ago emphasized:

> To persuade others to his own point of view, the pleader, as we know, at times, resorts to exaggeration, to vilification of men who have been, or are, prominent in church or state, and even to false statement. But the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of citizens of a democracy.

Cantwell v. Connecticut, 310 U.S. 296, 310, 60 S.Ct. 900, 84 L.Ed. 1213 (1940). Because the judgment attaches tort liability to constitutionally protected speech, the district court erred in declining to award judgment as a matter of law.

IV.

Pursuant to the foregoing, the judgment of the district court is reversed and the various appeal bonds are hereby discharged.

JUDGMENT REVERSED
AND BONDS DISCHARGED

SHEDD, Circuit Judge, concurring in the judgment:

Although I agree with the majority that the judgment below must be reversed, I would do so on different grounds. As I explain below, I would hold that Snyder failed to prove at trial sufficient evidence to support the jury verdict on any of his tort claims. Because the appeal can be decided on this nonconstitutional basis, I would not reach the First Amendment issue addressed by the majority.

I.

A.

Under the doctrine of constitutional avoidance, we are to avoid constitutional determinations when other grounds exist for the disposition of the case. *See Ashwander v. Tenn. Valley Auth*, 297 U.S. 288, 347, 56 S.Ct. 466, 80 L.Ed. 688 (1936) (Brandeis, J., concurring) ("It is not the habit of the court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case.") (internal citation and quotations marks omitted); *see also Bell Atl. Md., Inc. v. Prince George's County*, 212 F.3d 863, 866 (4th Cir.2000) (holding that "by deciding the constitutional question of preemption in advance of considering the state law questions upon which the case might have been disposed of, the district court committed reversible error"). Because the viability *vel non* of the state torts is dispositive as a nonconstitutional ground on which to decide this case, I would proceed to consider that issue in the first instance. To do otherwise would turn the principle of constitutional avoidance on its head; rather than avoiding unnecessary constitutional issues, we allow the parties to structure the case in order to force us to reach constitutional issues.

Neither the Phelps nor Snyder argue on appeal that the torts are deficient as a matter of law. Ordinarily, where a party fails to raise an issue in its opening brief, we deem the issue to be waived. *See Cavallo v. Star Enterprise*, 100 F.3d 1150, 1152 n. 2 (4th Cir.1996). Moreover, where an issue is raised only in an amicus brief, we generally decline to consider it. *See United States v. Buculei*, 262 F.3d 322, 333 n. 11 (4th Cir.2001). However, that rule is not absolute, and I believe it is within our authority to consider an issue not raised by the parties.

Our judicial power to decide a case is not limited by the arguments and actions of the parties. Moreover, while we "normally" decline to decide an issue not raised by the parties, "normally" necessarily implies that we are not precluded from doing so under certain circumstances. *See Carter v. Lee*, 283 F.3d 240, 252 (4th Cir.2002) (noting that "this Court normally views contentions not raised in an opening brief to be waived") (emphasis added); *see also Cousin v. Trans Union Corp.*, 246 F.3d 359, 373 n. 22 (5th Cir.2001) (noting that although issues not raised in initial brief are normally waived, the court has discretion to decide the issue); *Bridges v. City of Bossier*, 92 F.3d 329, 335 n. 8 (5th Cir.1996) (electing to examine purely legal issue not raised by party in opening brief, but raised by amicus curiae in its initial brief); *Estate of Lisle v. CIR*, 341 F.3d 364, 384 (5th Cir.2003) (holding that "[w]hile we may in our discretion decline to consider issues not raised in an initial brief, we choose to address the issue here"). Indeed, the Supreme Court has approved this practice. *See Teague v. Lane*, 489 U.S. 288, 300, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989) (plurality opinion); *see also Davis v. United States*, 512 U.S. 452, 457 n. 1, 114 S.Ct. 2350, 129 L.Ed.2d 362 (1994).

A case from the United States Court of Appeals for the District of Columbia Circuit is instructive on this point. *See Independent Ins. Agents of America, Inc. v. Clarke*, 955 F.2d 731 (D.C.Cir.1992) (disposing of a case on a basis not advanced by the parties), *rev'd on other grounds sub nom. U.S. Nat. Bank of Oregon v. Independent Ins. Agents of America, Inc.*, 508 U.S. 439, 445-47, 113 S.Ct. 2173, 124 L.Ed.2d 402 (1993). In denying rehearing *en banc*, a judge of that court noted

> Our colleagues question the "judicial power" of a federal court to decide an issue of law concededly dispositive of the case where parties have not raised the issue. *I think it most apparent that federal courts do possess this power. The alternative is that the parties could force a federal court to render an advisory opinion.* What the dissenters in effect argue is that the parties can stipulate to the state of underlying law; frame a law suit, assuming that stipulation; and obtain from the

> court a ruling as to what the otherwise dispositive law would be if the stipulated case were in fact the law. Indeed, that is precisely what would have occurred in this case had the panel not, sua sponte, raised the question. . . .

Independent Ins. Agents of America, Inc. v. Clarke, 965 F.2d 1077, 1078 (D.C.Cir.1992) (Sentelle, J., concurring) (emphasis added). Following the denial of rehearing *en banc*, the Supreme Court granted a writ of certiorari and specifically noted that the circuit court did have the authority to raise and decide an issue not raised by the parties. *See Independent Ins. Agents of America*, 508 U.S. at 447, 113 S.Ct. 2173 (noting that "[t]he contrary conclusion would permit litigants, by agreeing on the legal issue presented, to extract the opinion of a court on hypothetical Acts of Congress or dubious constitutional principles, an opinion that would be difficult to characterize as anything but advisory"). Thus, I believe we have the power to decide issues not raised by the parties and should exercise that power under certain circumstances.

Here, moreover, the dispositive nonconstitutional ground is already before us as the Thomas Jefferson Center for the Protection for Free Expression ("the Center"), which we permitted to file an amicus curiae brief, argues that the underlying state law torts are legally deficient. *See* Brief of the Thomas Jefferson Center for the Protection of Free Expression, at 15-30. Specifically, the Center contends that Snyder failed to establish that the Phelps intruded upon his seclusion or that the Phelps' activities are outrageous under Maryland law.

Thus, I am persuaded that we should consider the issues raised by the Center for several reasons. First, the Phelps clearly challenged the legal sufficiency of the state law torts in the district court by way of a motion for summary judgment and later in their post-trial motions. Second, Snyder has directly responded in this appeal to the issues that the Center raises. Third, and most importantly, the principle of constitutional avoidance requires us to avoid constitutional determinations when other grounds exist for the disposition of the case. Here, because the state law torts are not supported by the evidence presented at trial, I would reverse under state law and not under the First Amendment.

B.

Under Count One, the jury found the Phelps liable for the state law tort of "invasion of privacy by intrusion upon seclusion" because the Phelps invaded Albert Snyder's privacy during his time of bereavement. The jury was instructed that the elements of this claim are: "(1) An intentional (2) intrusion or prying upon (3) something which is and is entitled to be private (4) in a manner which is highly offensive to a reasonable person." J.A. 3110. Snyder apparently claims an intrusion upon seclusion occurred because of the Phelps' funeral protest and the television coverage thereof, and because of the "epic" which he found on the Internet several weeks after the funeral.

Under Maryland law, an "intrusion" occurs when there has been some act that interferes "into a private place or the invasion of a private seclusion that the plaintiff has thrown about his person or affairs." ***Furman v. Sheppard***, 130 Md.App. 67, 744 A.2d 583, 586 (2000) (internal citation and quotation marks omitted). Expounding on the types of "intrusion" Maryland law recognizes, the Maryland Court of Appeals has stated:

> [this tort] consists of intrusion upon the plaintiff's physical solitude or seclusion, as by invading his home or other quarters, or an illegal search of his shopping bag in a store. The principle has, however, been carried beyond such physical intrusion, and extended to eavesdropping upon private conversations by means of wire tapping and microphones; and there are decisions indicating that it is to be applied to peering into the windows of a home, as well as persistent and unwanted telephone calls. The tort has been found in the case of unauthorized prying into the plaintiff's bank account, and the same principle has been used to invalidate a blanket subpoena duces tecum requiring the production of all his books and documents, and an illegal compulsory blood test.

> It is clear, however, that there must be something in the nature of prying or intrusion. . . .

Hollander v. Lubow, 277 Md. 47, 351 A.2d 421, 425-26 (1976) (internal citations and quotation marks omitted). Several cases illustrate the type of conduct which constitutes an "intrusion upon seclusion" under Maryland law.

In *Furman*, a private club member who had been a plaintiff in an earlier lawsuit in which he claimed to be injured, brought suit against a private investigator who worked for the defense counsel in that lawsuit and who trespassed into a private club to videotape the plaintiff sailing on his yacht. *Furman*, 744 A.2d at 585. The club was surrounded by a security fence with conspicuously posted "Trespassers will be Prosecuted" signs. *Id.* The Maryland Court of Special Appeals held that "[t]here is no liability for observing [the plaintiff] in public places since he is not then in seclusion." *Id.* at 586. Even though he was in a private club, the court concluded that the plaintiff was in public because he was exposed to "public view by his neighbors and passers by." *Id.* at 587. Accordingly, the court ruled that there was no intrusion into his seclusion. *Id.*

In *Hollander*, the plaintiff sued several individuals and a bank for their revealing the fact that the plaintiff was a partner in a mortgage firm. *Hollander*, 351 A.2d at 422. For this, the plaintiff brought a claim for invasion of privacy by intrusion upon seclusion, among other claims. *Id.* The Maryland Court of Appeals held that there were no private facts revealed and, therefore, there was no intrusion upon seclusion. *Id.* at 426. The court elaborated:

> [t]he plaintiff cannot complain when an occupation in which he publicly engages is called to public attention, or when publicity is given to matters such as the date of his birth or marriage, or his military service record, which are a matter of public record, and open to public inspection. It seems to be generally agreed that anything visible in a public place can be recorded and given circulation by means of a photograph, to the same extent as by a written description, since this amounts to nothing more than giving publicity to what is already public and what anyone present would be free to see. *The contention that when an individual is thus singled out from the public scene and undue attention is focused upon him, there is an invasion of his private rights, has not been borne out by the decisions.* On the other hand, it is clear that when a picture is taken without the plaintiff's consent in a private place, or one already made is stolen, or obtained by bribery or other inducement of breach of trust, the plaintiff's appearance which is thus made public is still a private thing, and there is an invasion of a private right, for which an action will lie.

Id. (internal citation and quotation marks omitted) (emphasis added).

Additionally, where Maryland courts have recognized this cause of action, I find nothing analogous to Snyder's claim. For example, in ***Mitchell v. Baltimore Sun Co.***, 164 Md.App. 497, 883 A.2d 1008 (2005), a former congressman brought a cause of action for invasion of privacy by intrusion upon seclusion. His claim was based on two newspaper reporters who came to his nursing home room uninvited to purportedly investigate some of his unpaid bills. *Id.* at 1012. The reporters were aware that Mitchell was elderly and in failing health, and the nursing home had a sign that stated "NO TRESPASSING NO SOLICITING." *Id.* The reporters asked him a series of questions, and when he asked them repeatedly to leave, they refused. *Id.* at 1012. Finally, the congressman asserted "that one of the reporters looked through some files that he had in a filing cabinet, box, or on a desk near his bed." *Id.* 1012-13. In deciding to reverse summary judgment, the court held that these actions could constitute an intrusion upon seclusion under Maryland law. *Id.* at 1023-24.

In *Pemberton v. Bethlehem Steel Corp.*, 66 Md.App. 133, 502 A.2d 1101 (1986), a local union president filed suit for intrusion upon seclusion based upon various types of surveillance the defendants conducted on him. The Maryland Court of Special Appeals held that placing a surveillance microphone on a hotel door in order to hear private conversations inside a hotel room may be actionable as an intrusion upon seclusion.

However, the court further stated that other surveillance, such as watching the plaintiff's home from the street is not actionable as an intrusion upon seclusion because "there is no liability for observing [a person] in public places, since he is not then in seclusion." *Id.* at 1116-17 (internal quotation marks omitted).

In light of these cases, it is clear that there was no type of "intrusion" under any of the bases that Snyder asserts. First, as to the funeral protest itself, the Phelps did not "intrude" or "pry" upon any private seclusion. The Phelps never intruded upon a private place because their protest occurred at all times in a public place that was designated by the police and located approximately 1,000 feet from the funeral. Further, the Phelps never confronted Snyder, and Snyder admits he could not see the protest. Finally, there was no intrusion because the evidence is undisputed that the church service was never disrupted. The Phelps never entered the church, and they stopped protesting when the church service began. In sum, I would hold the funeral protest did not intrude upon Snyder's seclusion.[1]

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[1] To the extent Snyder's claim is based on his viewing the Phelps' protest on television, I would find that television coverage of a public protest that occurred in a public area is not an "intrusion." *Cf. Hollander*, 351 A.2d at 426 (noting that "[i]t seems to be generally agreed that anything visible in a public place can be recorded and given circulation by means of a photograph, to the same extent as by a written description, since this amounts to nothing more than giving publicity to what is already public and what anyone present would be free to see").

Likewise, I would hold that the Phelps' posting of the "epic" on their church Internet website is not, as a matter of law, an intrusion upon Albert Snyder's seclusion under Maryland law. In posting the "epic," the Phelps did not do anything to direct it to Snyder's attention, such as email or transmit it to him. *Cf. Hollander*, 351 A.2d at 426 (noting that repeated phone calls may give rise to an intrusion upon seclusion claim). Instead, Snyder learned of the "epic" during an Internet search, and upon finding it he chose to read it. By doing so, any interference with Snyder's purported interest in seclusion was caused by Snyder himself rather than the Phelps.

In short, I conclude that the verdict on Count One cannot stand. The evidence is insufficient under Maryland law for the jury to have found that the Phelps committed any act that intruded upon Snyder's right to seclusion.

C.

Under Count Two, the Phelps were held liable for intentional infliction of emotional distress. As charged to the jury, the elements for this tort are: (1) the Phelps' conduct was intentional or reckless; (2) the conduct was extreme and outrageous; (3) the conduct caused emotional distress to Snyder; and (4) the emotional distress was severe. J.A. 3111.

Under Maryland law, the second element requires conduct "so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *Pemberton*, 502 A.2d at 1115 (internal citation and quotation marks omitted). The Maryland Court of Special Appeals has held that "[t]he tort of intentional infliction of emotional distress is rarely viable, and is to be used sparingly and only for opprobrious behavior that includes truly outrageous conduct." *Bagwell v. Peninsula Regional Medical Center*, 106 Md.App. 470, 665 A.2d 297, 319 (1995) (internal citation and quotation marks omitted).[2] A review of Maryland cases illustrates the exacting burden of this element.

In *Figueiredo-Torres v. Nickel*, 321 Md. 642, 584 A.2d 69 (1991), the Maryland Court of Appeals upheld a claim for intentional infliction of emotional distress by a plaintiff whose psychologist had sexual relations with the plaintiff's wife. The court concluded that there was evidence of extreme and outrageous conduct "where a psychologist who is retained to improve a marital relationship implements a course of extreme conduct which is injurious to the patient and designed to facilitate a romantic, sexual relationship between the therapist and the patient's spouse." *Id.* at 75.

In *B.N. v. K.K.*, 312 Md. 135, 538 A.2d 1175, 1177 (1988), the Maryland Court of Appeals upheld a claim for intentional infliction of emotional distress where the defendant failed to disclose to the plaintiff that he had a sexually transmitted disease prior to having sexual relations with her. The plaintiff thereafter contracted this disease. *Id.* The court noted that the element of extreme and outrageous conduct was supported because of the risks and side effects of the disease the plaintiff contracted from the defendant. *Id.* at 1180.

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[2] A 1997 case of the Maryland Court of Special Appeals noted that the tort of intentional infliction of emotional distress had been upheld on only three occasions since Maryland began recognizing the tort in 1977. *See Penhollow v. Cecil County*, 116 Md.App. 265, 695 A.2d 1268, 1285 (1997).

In a final case where the Maryland Court of Appeals has upheld a claim of intentional infliction of emotional distress, *232 the plaintiff had suffered physical and emotional trauma from being assaulted at work. *See Young v. Hartford Accident & Indent. Co.*, 303 Md. 182, 492 A.2d 1270, 1271 (1985). After making disability payments, the defendant refused to pay certain doctor's bills and insisted the plaintiff undergo another psychological evaluation despite a doctor's warning of her fragile condition. *Id.* The court held that "[i]f [the plaintiff] proves that the sole purpose of [the psychologist's] examination was to harass the Plaintiff into abandoning her claim, or into committing suicide," the behavior would be extreme and outrageous. *Id.* at 1278 (internal quotation marks omitted).

On the other hand, Maryland has refused to uphold the tort in the context of other types of egregious conduct. In *Mitchell*, the two reporters entered a former congressman's nursing home room uninvited, and looked through his files without permission. *See* 883 A.2d at 1012-13. Even though the congressman was in failing health and the reporters had been asked to leave, the court held that these facts did not show extreme and outrageous conduct and stated that "[w]e are not persuaded that the reporters' questioning of Mitchell, even if conducted while trespassing, exceeded all possible bounds of decency, as to be regarded as atrocious, and utterly intolerable in a civilized society." *Id.* at 1025 (internal citation and quotation marks omitted).

In *Batson v. Shiflett*, 325 Md. 684, 602 A.2d 1191 (1992), the president of a local union was continually harassed by the defendants in an attempt to remove him from local office and to undermine his position. The plaintiff alleged that the defendants defamed him and committed the tort of intentional infliction of emotional distress. *Id.* at 1195. The court upheld the defamation claim but held that even though the defendant's conduct was defamatory, it "in no way satisfies our exacting standard for 'extreme and outrageous conduct.' " *Id.* at 1217.

In this case, Snyder asserts that the protest was extreme and outrageous because the funeral was disrupted by having the procession re-routed; his grieving process was disrupted by his having to worry about his daughters observing the Phelps' protest; and the Phelps' messages on their protest signs were focused on his family. As earlier noted, the protest was confined to a public area under supervision and regulation of local law enforcement and did not disrupt the church service. Although reasonable people may disagree about the appropriateness of the Phelps' protest, this conduct simply does not satisfy the heavy burden required for the tort of intentional infliction of emotional distress under Maryland law. Further, to the extent Snyder asserts the "epic" as a basis for this tort, I would find the "epic," which the district court found to be non-defamatory as a matter of law, is not sufficient to support a finding of extreme and outrageous conduct. Therefore, I believe the verdict on Count Two must be reversed.[3]

II.

In sum, I find the evidence cannot support the state torts at issue in this appeal and, therefore, I would not reach the First Amendment analysis the majority implores. Accordingly, I concur only in the result the majority reaches—the reversal of the judgment below.

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[3] The Phelps were also held liable for civil conspiracy under Count Three. Because the unlawful activity required for this count was the substantive offense of Count 1 or Count 2, this count must also be reversed. *See Green v. Washington Suburban Sanitary Commission*, 259 Md. 206, 269 A.2d 815, 824 (1970) (noting that "[a] civil conspiracy is a combination of two or more persons by an agreement or understanding to accomplish an unlawful act").

APPENDIX B — MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND FILED FEBRUARY 4, 2008

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil Action No. RDB-06-1389

ALBERT SNYDER,

Plaintiff,

v.

FRED W. PHELPS, Sr., *et al.*,

Defendants.

MEMORANDUM OPINION

On October 31, 2007, a jury awarded $10.9 million in compensatory and punitive damages to the Plaintiff, Albert Snyder ("Plaintiff" or "Snyder"), for acts of intentional infliction of mental and emotional distress, invasion of privacy by intrusion upon seclusion, and conspiracy to commit these acts by the Defendants, Fred W. Phelps, Sr. ("Phelps"), Shirley L. Phelps-Roper ("Phelps-Roper"), Rebekah A. Phelps-Davis ("Phelps-Davis"), and Westboro Baptist Church, Inc. (collectively, "Defendants"). These acts occurred before, during, and after the March 10, 2006 funeral of Snyder's son, Marine

Lance Corporal Matthew A. Snyder, who was killed in the line of duty in Iraq.

The funeral was conducted at St. John's Catholic Church in Westminster, Maryland. Defendants' acts included picketing as members of the Westboro Baptist Church and carrying signs that Defendants contend simply expressed their religious points of view. The signs expressed general points of view such as "America is doomed" and "God hates America." However, the signs also expressed more particularized messages, to wit: "You are going to hell," "God hates you," "Thank God for dead soldiers," and "Semper fi fags." Defendants' acts also included posting an "epic" entitled "The Burden of Marine Lance Cpl. Matthew Snyder" on the church's website, www. godhatesfags. com, in the weeks following the funeral. The publication on the church's website of "The Burden of Marine Lance Cpl. Matthew Snyder" expressed Defendants' view that Lance Cpl. Snyder had been "raised for the devil" and "taught to defy God." It was undisputed at trial that Defendants had never met Matthew Snyder or any members of his family.

In pre-trial motions, motions during trial, and post-trial motions, Defendants have contended that their actions and expressions were absolutely protected by the First Amendment to the United States Constitution, which provides that "Congress shall make no law . . . prohibiting the free exercise [of religion]; or abridging the freedom of speech. . . ."[1] This Court has held and continues to hold that the First Amendment does not afford absolute protection to individuals committing acts directed at other private individuals. The Supreme Court of the United States has specifically held that First Amendment protection of particular types of speech must be balanced against a state's interest in protecting its residents from wrongful injury. *Gertz v. Robert Welch Inc.*, 418 U.S. 323, 342-43, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974). Maryland particularly recognizes a cause of action protecting its residents from intentional infliction of emotional distress arising from outrageous conduct. Maryland also recognizes a cause of action for invasion of privacy by intrusion upon seclusion when there is an unwarranted invasion of a person's privacy which would be highly offensive to a reasonable person.

Accordingly, this case proceeded to trial before a jury on October 22, 2007 on three counts—intrusion upon seclusion, intentional infliction of emotional distress, and civil conspiracy.[2] In rendering its $10.9 million verdict for Plaintiff, the jury found that Defendants' conduct was outrageous, causing severe emotional distress to the Plaintiff, and that there was an unwarranted invasion of privacy highly offensive to a reasonable person.

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[1] U.S. Const. amend. I.

[2] All parties requested a jury trial in this matter. This Court granted Defendants' motions for summary judgment on two of the five original claims. *See* discussion *infra* pages 572-73.

Defendants have filed post-trial motions for Judgment as a Matter of Law, Judgment Notwithstanding the Verdict, Reconsideration and Rehearing, New Trial, Relief from Judgment, and Relief of Law and Equity. The issues have been fully briefed and there is no need for a hearing. *See* Local Rule 105.6 (D.Md.2008). For the reasons that follow, these motions are DENIED. There was also more than sufficient evidence to support the jury's verdict on Defendants' liability. There was more than sufficient evidence to support the jury's verdict that Defendants' conduct before, during, and after the funeral of Matthew Snyder was outrageous, designed to inflict emotional distress upon Plaintiff, and that the intrusion upon the seclusion of Plaintiff and his family was highly offensive to a reasonable person.

Defendants have also moved for *remittitur*, contending that the jury's verdict was grossly excessive. For the reasons that follow, the Motions for *Remittitur* are DENIED in part and GRANTED in part. Applying state common law standards, this Court upholds the verdict of the jury and the compensatory damage award of $2.9 million. However, under both federal constitutional and state common law standards, this Court reduces the total punitive damages award against all Defendants to $2.1 million.[3] Accordingly, the total award of damages in this case is reduced to $5 million.

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[3] The $2.1 million punitive damages award is apportioned as follows: $1 million against the Defendant Westboro Baptist Church, Inc., $600,000 against Defendant Shirley L. Phelps-Roper, $300,000 against Defendant Fred W. Phelps, Sr., and $200,000 against Defendant Rebekah A. Phelps-Davis.

Defendants have also filed Motions to Stay the execution of the judgment. Those motions remain pending before this Court until a determination of the security to be provided by Defendants for the revised judgment in this case has been made.

BACKGROUND AND PROCEDURAL HISTORY

The facts of this case as presented at trial were largely undisputed. On March 3, 2006, Marine Lance Corporal Matthew A. Snyder was killed in Iraq in the line of duty. Shortly thereafter, two United States Marines came to the home of the Plaintiff, Albert Snyder, and told him that his son had died. As Matthew Snyder had lived in Westminster, Maryland, and graduated from Westminster High School, St. John's Catholic Church in Westminster was selected as the site for his funeral, which was scheduled for March 10, 2006. Obituary notices were placed in local newspapers providing notice of the time and location of the funeral.

Defendant Fred W. Phelps, Sr., founded Defendant Westboro Baptist Church, Inc. in Topeka, Kansas, in 1955. For fifty-two years, he has been the only pastor of the church, which has approximately sixty or seventy members, fifty of whom are his children, grandchildren, or in-laws. Among these family members are Defendants Shirley L. Phelps-Roper and Rebekah A. Phelps-Davis. There are approximately ten to twenty members of the church who are not related to Phelps by blood or marriage. According to the testimony of Defendants' expert, the members of this church practice a "fire and brimstone" fundamentalist religious faith. Among their religious beliefs is that God hates homosexuality and hates and punishes America for its tolerance of homosexuality, particularly in the United States military. Members of the church have increasingly picketed funerals to assert these beliefs. Defendants have also established a website identified as www. godhatesfags. com in order to publicize their religious viewpoint.

Defendants' testimony at trial established that their picketing efforts gained increased attention when they began to picket funerals of soldiers killed in recent years. Members of the Phelps family prepare signs at an on-site sign shop at their Kansas church to take with them in their travels. They also utilize an on-site production facility to produce videos displayed on the church's website.

Phelps testified that members of the Westboro Baptist Church learned of Lance Cpl. Snyder's funeral and issued a news release on March 8, 2006, announcing that members of the Phelps family intended to come to Westminster, Maryland, and picket the funeral. On March 10, 2006, Phelps, his daughters Phelps-Roper and Phelps-Davis, and four of his grandchildren arrived in Westminster, Maryland, to picket Matthew Snyder's funeral. None of the Defendants ever met any members of the Snyder family.

Defendants' rationale was quite simple. They traveled to Matthew Snyder's funeral in order to publicize their message of God's hatred of America for its tolerance of homosexuality. In Plaintiff's eyes, Defendants turned the funeral for his son into a "media circus for their benefit." By notifying police officials in advance, Defendants recognized that there would be a reaction in the community. They carried signs which expressed general messages such as "God Hates the USA," "America is doomed," "Pope in hell," and "Fag troops." The signs also carried more specific messages, to wit: "You're going to hell," "God hates you," "Semper fi fags," and "Thank God for dead soldiers." Phelps testified that it was Defendants' "duty" to deliver the message "whether they want to hear it or not." Lance Cpl. Snyder's funeral was thus utilized by Defendants as the vehicle for this message.

It was undisputed at trial that Defendants complied with local ordinances and police directions with respect to being a certain distance from the church. Furthermore, it was established at trial that Snyder did not actually see the signs until he saw a television program later that day with footage of the Phelps family at his son's funeral.

Defendants' utilization of Matthew Snyder's funeral to publicize their message continued after the actual funeral on March 10, 2006. After returning to Kansas, Phelps-Roper published an "epic" on the church's website, www. godhatesfags. com. In "The Burden of Marine Lance Cpl. Matthew Snyder" (Pl.'s Trial Ex. 20), Phelps-Roper stated that Albert Snyder and his ex-wife "taught Matthew to defy his creator," "raised him for the devil," and "taught him that God was a liar." In the aftermath of his son's funeral, Snyder learned that there was reference to his son on the Internet after running a search on Google. Through the use of that search engine, he read Phelps-Roper's "epic" on the church's website.

Snyder testified at length about his emotional and physical reaction not only to the demonstration at his son's funeral but also to the publication of the "epic" on the Internet. He specifically testified that he "threw up" and "cried for about three hours" after viewing the "epic" approximately four to five weeks after his son's funeral. He also presented expert testimony with respect to the effect that Defendants' actions had and continue to have on him.

On June 5, 2006, Albert Snyder filed this case against Fred W. Phelps, Sr. and the Westboro Baptist Church, Inc. (the "church Defendants"). Shirley L. Phelps-Roper and Rebekah A. Phelps-Davis (the "*pro se* Defendants") were added as Defendants on February 23, 2007. Jurisdiction of this Court was based on the diversity of citizenship of the parties pursuant to 28 U.S.C. § 1332. Snyder originally brought five counts against Defendants—defamation, intrusion upon seclusion, publicity given to private life, intentional infliction of emotional distress, and civil conspiracy. After hearing oral arguments on October 15, 2007, this Court granted Defendants' motions for summary judgment as to the defamation and publicity given to private life claims.

As to the defamation count, this Court noted at the hearing that, pursuant to *Samuels v. Tschechtelin*, 135 Md.App. 483, 763 A.2d 209, 241-42 (Md.Ct. Spec.App.2000), the elements of a defamation claim under Maryland law include (1) that Defendants made a defamatory communication to a third person, (2) that the statement was false, (3) that Defendants were at fault in communicating the statement, and (4) that Plaintiff suffered harm. This Court held that the first element, a defamatory communication, was not satisfied because the content of the "epic" posted on the church's website was essentially Phelps-Roper's religious opinion and would not realistically tend to expose Snyder to public hatred or scorn. Accordingly, Defendants' motions for summary judgment were granted as to the defamation claim.

As to the publicity given to private life claim, this Court cited *Furman v. Sheppard*, 130 Md.App. 67, 744 A.2d 583, 588 (Md.Ct.Spec.App.2000), pursuant to which Plaintiff would have to prove that Defendants gave publicity to a matter concerning his private life and that the matter publicized was of a kind which (a) would be highly offensive to a reasonable person and (b) is not of legitimate concern to the public. This Court held that no private information was made public by Defendants. Defendants learned that Snyder was divorced and that his son was Catholic from the obituary in the newspaper. In addition, any publication of this information would not be highly offensive to a reasonable person as it was already a matter of public record. Accordingly, this Court granted Defendants' motions for summary judgment as to the publicity given to private life claim.

This Court held, however, that the remaining three claims—intrusion upon seclusion, intentional infliction of emotional distress, and civil conspiracy—raised genuine issues of material fact to be determined by a jury. Accordingly, the case was tried before a jury from October 22, 2007 to October 30, 2007. On October 31, 2007, the jury returned a verdict in favor of Plaintiff and against all four Defendants on the three claims, awarding compensatory damages of $2.9 million. After hearing additional instructions and arguments, the jury awarded Plaintiff $8 million in punitive damages—$6 million for the invasion of privacy claim and $2 million for the intentional infliction of emotional distress claim.[4] Judgment was entered by this Court on November 2, 2007. (Paper No. 208.)

On November 8, 2007, *pro se* Defendants Phelps-Roper and Phelps-Davis filed (1) a Motion for Judgment as a Matter of Law, Motion for Judgment Notwithstanding the Verdict, Motion for Reconsideration and Rehearing, Motion to Alter or Amend the Judgment, Motion for New Trial and/or *Remittitur*, Motion for Relief from Judgment, Motion for Any Other Relief in Law and Equity Warranted under the Facts and Law (Paper No. 211), and (2) a Motion for

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[4] Specifically, as to the invasion of privacy count, the jury awarded $1.5 million against Westboro Baptist Church, $1.5 million against Fred W. Phelps, Sr., $1.5 million against Shirley L. Phelps-Roper, and $1.5 million against Rebekah A. Phelps-Davis. As to the intentional infliction of emotional distress count, the jury awarded $500,000 against each of the four Defendants.

Stay (Paper No. 212). On November 14, 2007, the church Defendants Phelps and Westboro Baptist Church, filed (1) a Motion for Stay (Paper No. 214), and (2) a Motion for Judgment as a Matter of Law, Motion for Judgment Notwithstanding the Verdict, Motion for Reconsideration and Rehearing, Motion to Alter or Amend the Judgment, Motion for New Trial and/or *Remittitur*, Motion for Relief from Judgment, Motion for Any Other Relief in Law and Equity Warranted under the Facts and Law (Paper No. 215).

STANDARDS OF REVIEW

I. Motion for Judgment as a Matter of Law & Judgment Notwithstanding the Verdict

First, Defendants move for judgment as a matter of law and for a judgment notwithstanding the verdict pursuant to Rule 50 of the Federal Rules of Civil Procedure.[5] Pursuant to Rule 50(b), "a district court may grant JNOV 'if there is no legally sufficient evidentiary basis for a reasonable jury to find for the [non-moving] party. . . .' " *Cline v. Wal-Mart Stores*, 144 F.3d 294, 301 (4th Cir.1998) (citation omitted); *see also Gibson v. Old Town Trolley Tours*, 160 F.3d 177, 181 (4th Cir.1998). The standard for granting judgment as a matter of law both during and after trial is the same. *See Adkins v. Crown Auto, Inc.*, 488 F.3d 225, 231 (4th Cir.2007).

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[5] This Court notes that the Federal Rules of Civil Procedure were amended on December 1, 2007. However, none of the rules cited by the parties in this case were substantially changed by the amendments, however, which were "intended to be stylistic only." Fed.R.Civ.P. 62 advisory committee's note (rev. ed.2007).

II. Motion to Amend the Judgment & Motion for Reconsideration

Defendants also move to amend the judgment and for reconsideration pursuant to Rule 59(e).[6] Generally, "reconsideration of a judgment after its entry is an extraordinary remedy which should be used sparingly." *Pacific Ins. Co. v. Am. Nat'l Fire Ins. Co.*, 148 F.3d 396, 403 (4th Cir.1998). The United States Court of Appeals for the Fourth Circuit has identified three grounds for amending an earlier judgment: "(1) to accommodate an intervening change in controlling law; (2) to account for new evidence not available at trial; or (3) to correct a clear error of law or prevent manifest injustice." *Zinkand v. Brown*, 478 F.3d 634, 637 (4th Cir.2007) (internal citations omitted). The Fourth Circuit has cautioned that

> Rule 59(e) motions may not be used . . . to raise arguments which could have been raised prior to the issuance of the judgment, nor may they

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[6] The Defendants also cite Rule 52, pursuant to which the Court "may amend its findings [of fact]-or make additional findings-and may amend the judgment accordingly." Fed.R.Civ.P. 52(b). However, Defendants' reliance on Rule 52 is misplaced, because that Rule applies to "actions tried upon the facts without a jury or with an advisory jury." In contrast, this case was tried before a jury, which returned a verdict on all three claims.

> be used to argue a case under a novel legal theory that the party had the ability to address in the first instance. Similarly, if a party relies on newly discovered evidence in its Rule 59(e) motion, the party must produce a legitimate justification for not presenting the evidence during the earlier proceeding.

Pacific Ins. Co., 148 F.3d at 403 (internal citations omitted).

III. Motion for New Trial and/or *Remittitur*

Next, Defendants move for a new trial pursuant to Rule 59(a), which is a matter "resting in the sound discretion of the trial judge." *Eberhardt v. Integrated Design & Constr., Inc.*, 167 F.3d 861, 869 (4th Cir.1999). A new trial should be granted "only if 1) the verdict is against the clear weight of the evidence, 2) is based on evidence which is false, or 3) will result in a miscarriage of justice, even though there may be substantial evidence which would prevent the direction of a verdict." *Dennis v. Columbia Colleton Med. Ctr., Inc.*, 290 F.3d 639, 650 (4th Cir.2002) (citations omitted). In considering a motion for a new trial, this Court "may weigh the evidence and consider the credibility of the witnesses." *Conner v. Schrader-Bridgeport Int'l, Inc.*, 227 F.3d 179, 200 (4th Cir.2000) (citing *Wyatt v. Interstate & Ocean Transport Co.*, 623 F.2d 888, 891 (4th Cir.1980)).

In addition to requesting a new trial based on the verdict, Defendants move for a new trial *remittitur*, a procedure that empowers this Court to grant Defendants' request for a new trial if Plaintiff refuses *575 to accept a reduced monetary award. *Cline*, 144 F.3d at 305; *G.M. Garrett Realty v. Century 21*, 17 Fed.Appx. 169, 172 (4th Cir.2001) ("The federal courts have a long-standing practice of resolving excessive verdicts through conditioning the denial of a Rule 59 motion upon the acceptance by the plaintiff of a *remittitur* in a stated amount."); *see also* 12 James Wm. Moore *et al.*, Moore's Federal Practice § 59.13 ("*Remittitur* is defined as the process by which a court compels a plaintiff to choose between the reduction of an excessive verdict and a new trial. If the plaintiff rejects the specified reduction in the amount of damages, the court must grant a new trial; the court does not have the option of entering judgment for the reduced amount without the plaintiff's consent."). This Court has an affirmative duty to order a new trial if the jury's damage award is excessive. *Cline*, 144 F.3d at 305.

Defendants also challenge the jury's punitive award on the grounds that it violates the Due Process Clause of the Fifth Amendment to the United States Constitution.[7] This Court's review of the punitive damages award under the Due Process Clause is procedurally different than a traditional *remittitur*, which requires offering a new trial to Plaintiff to comport with his right to a jury trial under the Seventh Amendment. To the extent that a reduction of punitive damages is based on constitutional safeguards, an option for a new trial is unwarranted. The United States Court of Appeals for the Eleventh Circuit has explained as follows:

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[7] U.S. Const. amend. V.

> A constitutionally reduced verdict, therefore, is really not a *remittitur* at all. A *remittitur* is a substitution of the court's judgment for that of the jury regarding the appropriate award of damages. The court orders a *remittitur* when it believes the jury's award is unreasonable on the facts. A constitutional reduction, on the other hand, is a determination that the law does not permit the award. Unlike a *remittitur*, which is discretionary with the court and which we review for an abuse of discretion, *Gasperini*, 518 U.S. at 435, 116 S.Ct. 2211, a court has a mandatory duty to correct an unconstitutionally excessive verdict so that it conforms to the requirements of the due process clause. *[BMW of North America, Inc. v. Gore*, 517 U.S. 559, 585, 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996).]

Johansen v. Combustion Eng'g., Inc., 170 F.3d 1320, 1331 (11th Cir.1999) (emphasis omitted).

IV. Motion for Relief

Next, Defendants move for relief from judgment pursuant to Rule 60 of the Federal Rules of Civil Procedure. Under that rule,

> the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:
>
> > (1) mistake, inadvertence, surprise, or excusable neglect;
> >
> > (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);
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> > (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;
> >
> > (4) the judgment is void;
> >
> > (5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or

> (6) any other reason that justifies relief.

Fed.R.Civ.P. 60(b). Granting a motion for relief is within the court's discretion. *Agostini v. Felton*, 521 U.S. 203, 238, 117 S.Ct. 1997, 138 L.Ed.2d 391 (1997).

V. Motion to Stay

Finally, Defendants move for "a stay of the verdict and judgment in this case, in full, without requiring a bond, pending resolution of post-trial motions and all appeals." (*Pro se* Defs.' Mot. Stay 1; Church Defs.' Mot. Stay 1.) Rule 62(b) of the Federal Rules of Civil Procedure provides that "the court may stay the execution of a judgment—or any proceedings to enforce it-pending disposition" of motions made pursuant to Rules 50, 52(b), 59, and 60. If granting a motion to stay, the court must provide "appropriate terms for the opposing party's security." Fed.R.Civ.P. 62(b).[8] In addition, Rule 62(d) provides that "[i]f an appeal is taken, the appellant may obtain a stay by supersedeas bond" subject to the court's approval. Fed.R.Civ.P. 62(d).

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[8] Rule 62 was one of the Federal Rules of Civil Procedure amended on December 1, 2007. The previous version of Rule 62(b), cited by the parties, was substantively the same, requiring "such conditions for the security of the adverse party as are proper. . . ." Fed.R.Civ.P. 62(b) (2007).

ANALYSIS

I. Motion for Judgment as a Matter of Law & Judgment Notwithstanding the Verdict

First, Defendants move for judgment as a matter of law and for judgment notwithstanding the verdict pursuant to Rule 50 of the Federal Rules of Civil Procedure. At trial, Defendants moved for judgment as a matter of law after the presentation of Plaintiff's case, Defendants' case, and the conclusion of rebuttal testimony. Each motion was denied by this Court on the record. Thus, Defendants have renewed their motion. This Court finds that there was a legally sufficient evidentiary basis for the jury to find for Plaintiff on each of his three claims.

A. The First Amendment Defense

As an initial matter, Defendants have repeatedly argued that their actions were entitled to absolute First Amendment protection. (*See, e.g., pro se* Defs.' Mem. Supp. Post-trial Mots. 2; Church Defs.' Mem. Supp. Post-trial Mots. 5.) Their defense implicates both the Free Exercise Clause and the Free Speech Clause of the First Amendment.[9] They once again argue in the pending motions that this lawsuit and the resulting jury verdict unconstitutionally restrict the *content* of their speech, which was in the form of signs and the "epic" entitled "The Burden of Marine Lance Cpl. Matthew Snyder" published on the church's website. They contend that their speech was purely religious in nature. However, the Supreme Court of the United States has long recognized that "not all speech is of equal First Amendment importance." *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 758, 105 S.Ct. 2939, 86 L.Ed.2d 593 (1985). In *Dun & Bradstreet, Inc.*, the Supreme Court held that a private individual could recover damages under a common law defamation claim where the subject of the lawsuit was a matter of private concern. *Id.* at 763, 105 S.Ct. 2939. The Supreme Court cited its previous opinion in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974), in which it held that the First Amendment interest in protecting speech must be balanced against a state's interest in protecting its residents from tortious injury. Quite simply, the Supreme Court has recognized that there is not an absolute First Amendment right for any and all speech directed by private individuals against other private individuals.

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[9] The First Amendment of the United States Constitution provides, *inter alia*, that "Congress shall make no law . . . prohibiting the free exercise [of religion]; or abridging the freedom of speech. . . ." These restrictions have been extended to state governments through the Fourteenth Amendment.

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Recognizing the significance of the Supreme Court's holding that "not all speech is of equal First Amendment

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See, e.g., *McCreary County v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 853 n. 3, 125 S.Ct. 2722, 162 L.Ed.2d 729 (2005); *Virginia v. Black*, 538 U.S. 343, 358, 123 S.Ct. 1536, 155 L.Ed.2d 535 (2003).

importance," *Dun & Bradstreet, Inc.*, 472 U.S. at 758, 105 S.Ct. 2939, Defendants argue that the funeral was both a matter of public concern and a public event. They further contend that Lance Cpl. Snyder became a public figure and his funeral became a public event when his father, Albert Snyder, filed a notice of the funeral in the obituary section of a local newspaper, and that both Plaintiff and his son were, therefore, public figures. Defendants' theory is that an individual becomes a public figure upon the filing of information in the obituary section of any newspaper.

This argument is without merit. The test for public figures was articulated by Justice Powell in *Gertz:*

> For the most part, . . . [they] have assumed roles of especial prominence in the affairs of society. Some occupy positions of such persuasive power and influence that they are deemed public figures for all purposes. More commonly, those classed as public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved. In either event, they invite attention and comment.

418 U.S. at 345, 94 S.Ct. 2997. The evidence in this case was quite clear that Albert Snyder did not "invite attention and comment" when he prepared a funeral for

his son, but rather he intended for the funeral to be private.[10]

Indeed, the evidence in this case was undisputed that Defendants traveled to the funerals of young men such as Lance Cpl. Snyder so as to publicize their religious opinions and the alleged participation of homosexuals in the military. While earlier religious demonstrations had received little publicity, the demonstrations by the Westboro Baptist Church at the funerals of soldiers generated greater publicity. Phelps-Roper explained the usual *modus operandi* of her church as applied to Matthew Snyder's funeral. First, Defendants provided notice to law enforcement personnel in Westminster, Maryland of their intent to picket at Lance Cpl. Snyder's funeral. In light of past problems arising from the Westboro Baptist Church's demonstrations at military funerals, this notice necessarily resulted in increased police presence and media coverage at Lance Cpl. Snyder's funeral. Defendants cannot by their own actions transform a private funeral into a public event and then bootstrap their position by arguing that Matthew Snyder was a public figure.

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[10] Defendants have consistently maintained that the funeral for Lance Cpl. Snyder was a public event because the obituary in the newspaper did not expressly limit the funeral to friends and family. However, both Plaintiff and Father Leo Patalinghug of St. John's Church, who presided over the funeral, testified that the funeral was intended to be private.

By their own actions, Defendants also created an atmosphere of confrontation. This atmosphere was created by signs carrying both a general message as well as signs that could reasonably be interpreted as being directed at the Snyder family. There were signs expressing general points of view such as "America is doomed" and "God hates America." However, there were also signs stating "Thank God for dead soldiers," "Semper fi fags," "You are going to hell," and "God hates you." While signs expressing general points of view are afforded First Amendment protection, these additional signs, which could be interpreted as being directed at the Snyder family, created issues for the finder of fact. Comments published on the church website stating that Matthew Snyder was raised for the devil and was taught to defy God created similar issues to be addressed by the finder of fact. The jury addressed these issues and determined that such comments on signs and on the website were so outrageous as to inflict severe emotional distress and invade the privacy of a private citizen during a time of bereavement.

Defendants alternatively argue that their comments and actions are protected by the Free Exercise Clause of the First Amendment. They contend that any comments and opinions expressed on signs or on their website were expressions of their fundamentalist religious beliefs.[11] It is indeed ironic that Defendants

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[11] Consistent with this line of defense, counsel for Defendants Phelps and Westboro Baptist Church introduced

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chose to publicize their fundamentalist beliefs at the funeral of a twenty-year-old Marine in the State of Maryland, which was founded on principles of religious tolerance.[12] Defendants presented a religious expert, Professor Randall Balmer, who offered testimony

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into evidence a series of DVD video productions, which included "Thank God for 9/11," in which members of the Westboro Baptist Church celebrated the events of September 11, 2001 as a demonstration of God's hatred of America. (*See* Defs.' Trial Exs. 41a-f.) Counsel later apologized in his closing argument to the jury for the presentation of these videos.

[12] *See* Charles A. Rees, *Remarkable Evolution: The Early Constitutional History of Maryland*, 36 U. Balt. L.Rev. 217, 229 (2007) (citation omitted). During Maryland's colonial era, "[r]eligious toleration between Catholics and Protestants was threatened by the rise of a fundamentalist puritanism." *Id.* (citation omitted). In response to such fundamentalism, the General Assembly of the Colony of Maryland passed the Act of Toleration in 1649, "a major step in the principle of freedom of religion in America." *Our Nation's Archive: The History of the United States in Documents* 53 (Erik Bruun & Jay Crosby, eds.1999). This act "has been called the first document (in the Anglo-American tradition) protecting the free exercise of religion." Rees, *supra*, at 229 (citing 1 *Archives of Maryland* 31 (William Hand Browne *et al.* eds., 1883-1947) and 1 Bernard Schwartz, *The Bill of Rights: A Documentary History* 67 (Leon Friedman ed., 1971)). "The success of religious toleration in Maryland served as a model for the nation a century later." *Our Nation's Archive*, *supra*, at 53. However, this freedom of religion was only accorded to those who believed in Jesus Christ and was therefore imperfect by modern standards. *See id.* at 53; David S. Bogen, *The Origins of Freedom of Speech and Press*, 42 Md. L.Rev. 429, 454 (1983).

explaining the nature of the Defendants' "fire and brimstone" religious beliefs. Professor Balmer acknowledged in his testimony, however, that there was no Biblical or religious connection to Defendants' choice of demonstrations at military funerals. As previously noted, Defendants essentially acknowledged in their testimony that their choice of military funerals was driven by the publicity the demonstrations generated.

Defendants' First Amendment arguments place great emphasis on cases involving ***statutory*** restrictions. For example, the Supreme Court's opinion in ***Church of the Lukumi Babalu Aye Inc. v. City of Hialeah***, 508 U.S. 520, 113 S.Ct. 2217, 124 L.Ed.2d 472 (1993), is of limited assistance to the Defendants. In that case, the Supreme Court held that a city ordinance that burdens a religious practice need not be justified by a compelling state interest if that ordinance is neutral and of general applicability. That opinion followed the Supreme Court's earlier opinion in ***Employment Div., Dep't of Human Res. v. Smith***, 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990), in which the Supreme Court held that the State of Oregon could prohibit sacramental peyote use, consistent with the Free Exercise Clause of the First Amendment. In the opinion, Justice Scalia particularly noted that:

> We have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate. On the contrary, the record of more than a

> century of our free exercise jurisprudence contradicts that proposition.

Id. at 878-79, 110 S.Ct. 1595.

Defendants can point to some successful attacks by the Westboro Baptist Church upon *statutory* restrictions which have been held not to meet these standards of neutrality and general applicability. For example, in *McQueary v. Stumbo*, 453 F.Supp.2d 975 (E.D.Ky.2006), the court addressed a statute which it found was "at least partially aimed at prohibiting members of the Westboro Baptist Church . . . from protesting at funerals" as they engage "in a campaign against homosexuality." *Id.* at 983. The court granted a preliminary injunction to the plaintiff, holding that the provisions of the statute were not sufficiently narrowly tailored and that the provisions barring visual and auditory displays were unconstitutionally broad. To similar effect is the recent victory of Defendant Shirley L. Phelps-Roper in her appeal to the United States Court of Appeals for the Eighth Circuit in *Phelps-Roper v. Nixon*, 509 F.3d 480 (8th Cir.2007), in which the Eighth Circuit reversed the district court's denial of injunctive relief. In that case, a Missouri misdemeanor statute criminalized picketing or other protest activities "in front of or about" a funeral location. The Eighth Circuit noted the overbreadth of the statute and held that Phelps-Roper had a fair chance of success on her claims that the criminal statute was not narrowly tailored and that the state's interest was outweighed by her First Amendment rights.

This case, however, does not involve a criminal statute. Nor does it involve any prohibition of Defendants' First Amendment rights of religious expression. Rather, this case involves balancing those rights with the rights of other private citizens to avoid being verbally assaulted by outrageous speech and comment during a time of bereavement. In *Cantwell v. Connecticut*, 310 U.S. 296, 303-04, 60 S.Ct. 900, 84 L.Ed. 1213 (1940), the Supreme Court held that freedom of religion "embraces two concepts,—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be." The Supreme Court reasoned that "[c]onduct remains subject to regulation for the protection of society." *Id.* at 304, 60 S.Ct. 900. Hence, an individual's First Amendment rights must be balanced against a state's interest in protecting its citizens. *Cf. Wisconsin v. Yoder*, 406 U.S. 205, 214, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972).

A state's interest in protecting its citizens is set forth not only in criminal statutes, but also by civil tort liability. *See generally* Alan Stephens, Annotation, *Free exercise of religion clause of First Amendment as defense to tort liability*, 93 A.L.R. Fed. 754 (1989). There is abundant case authority in which courts have balanced First Amendment rights with the imposition of tort liability based on the defendants' conduct in the exercise of those religious rights. For example, in *Guinn v. Church of Christ of Collinsville*, 775 P.2d 766 (Okla.1989), the court held that the conduct of church elders became "amenable to state regulation through the imposition of tort liability," including invasion of privacy and intentional infliction of emotional distress, after they revealed certain private facts about the plaintiff, a former parishioner of the church. *Id.* at 778. The court drew a distinction between the elders' acts taken while the plaintiff was a member of the church and those acts taken after she withdrew her membership, noting that the first acts were protected by the First Amendment while the latter acts were not. *Id.* at 779. The court held that "[n]o real freedom to choose religion would exist in this land if under the shield of the First Amendment religious institutions could impose their will on the unwilling and claim immunity from secular judicature for their tortious acts." *Id. See also Molko v. Holy Spirit Ass'n for the Unification of World Christianity*, 46 Cal.3d 1092, 252 Cal.Rptr. 122, 762 P.2d 46, 56-58 (1988) (holding that neither the United States Constitution nor the California Constitution banned traditional tort action against a church for fraud and misrepresentation).

B. The Substantive Claims

As this Court's jurisdiction is based upon diversity of citizenship, *Erie* principles apply and this Court is guided by Maryland common law. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78, 58 S.Ct. 817, 82 L.Ed. 1188 (1938); *see also Colgan Air, Inc. v. Raytheon Aircraft Co.*, 507 F.3d 270, 275 (4th Cir.2007).

1. Intentional Infliction of Emotional Distress

The tort of intentional infliction of emotional distress has been recognized in Maryland since 1977 when the Court of Special Appeals became "persuaded that the new tort, in a proper case, is viable in this State." *Jones v. Harris*, 35 Md.App. 556, 371 A.2d 1104, 1107 (Md.Ct.Spec.App.1977) (citing Restatement (Second) of Torts § 46 (1965)). On appeal, the Court of Appeals of Maryland ultimately reversed the intermediate appellate court's finding that there was sufficient evidence of severe emotional distress to submit the case to a jury, but affirmed the existence of a cause of action. *Harris v. Jones*, 281 Md. 560, 380 A.2d 611, 616 (1977). This Court has previously recognized that, in order to succeed on a claim for intentional infliction of emotional distress, a plaintiff must demonstrate that the "defendant[s], intentionally or recklessly, engaged in extreme and outrageous conduct that caused the plaintiff to suffer severe emotional distress." *Miller v. Bristol-Myers Squibb Co.*, 121 F.Supp.2d 831, 839 (D.Md.2000) (citing *Harris*, 380 A.2d at 614).

As to the intentional infliction of emotional distress claim in this case, Defendants contend that Plaintiff "did not show severe and specific injury as Maryland law requires." (*Pro se* Defs.' Mem. Supp. Post-trial Mots. 22.) They also argue that "the *only* way to satisfy the requirements of 'highly offensive' or 'extreme and outrageous' is to go to the content of religious speech." (*Id.* (emphasis in original).) Plaintiff's experts testified at trial that his depression and diabetes were exacerbated after the events of March 10, 2006, the date of his Matthew Snyder's funeral and Defendants' protest, and again after the publication of the "epic" concerning his son on the website. While the doctors concluded that it would be nearly impossible for Plaintiff to separate the emotional impact of Defendants' actions from preexisting conditions and from general grief over the loss of his son, they agreed that Defendants' actions had a significant impact. Thus, the jury had sufficient evidence before it to conclude that Plaintiff suffered "severe and specific" injuries.

As to the issue of the content of the signs, this Court instructed the jury on the First Amendment, specifically the balance between Defendants' First Amendment rights and Maryland's interest in protecting its citizens from intentional infliction of emotional distress. There was sufficient evidence in the trial record for a reasonable jury to conclude that Defendants' conduct was so extreme and outrageous as to cause Plaintiff's injury.

2. Intrusion upon Seclusion

"Invasion of privacy" has been the basis of a cause of action in Maryland since it was recognized in *Carr v. Watkins*, 227 Md. 578, 177 A.2d 841, 845 (1962). In 1969, the Court of Appeals of Maryland recognized that "four courses of conduct may give rise to a cause of action" including intrusion upon seclusion. *Household Fin. Corp. v. Bridge*, 252 Md. 531, 250 A.2d 878, 883 (1969).

The claim for intrusion upon seclusion has not been reviewed frequently by the Maryland appellate courts. In a recent case, the Court of Special Appeals of Maryland reversed a Circuit Court for Baltimore City decision granting summary judgment to the defendant newspaper, finding that there were genuine issues of material fact as to whether the newspaper intruded upon a former congressman's seclusion when reporters visited him in an assisted living facility and published comments he made in the paper. *Mitchell v. Baltimore Sun Co.*, 164 Md.App. 497, 883 A.2d 1008, 1023 (Md.Ct.Spec.App.2005), *cert. denied*, 390 Md. 501, 889 A.2d 418 (2006).

As to the intrusion upon seclusion claim in this case, Defendants argue that "the evidence shows there was *no* intrusion into *anything*—not the funeral, not plaintiff's home, not his psyche." (*Pro se* Defs.' Mem. Supp. Post-trial Mots. 22 (emphasis in original).) They argue that Plaintiff "reached, even eagerly dug, into a public place and *chose* to read or hear the words." (*Id.* (emphasis in original).) A reasonable jury could find, however, that when Snyder turned on the television to see if there was footage of his son's funeral, he did not "choose" to see close-ups of the Defendants' signs and interviews with Phelps and Phelps-Roper, but rather their actions intruded upon his seclusion.

Defendants' argument also ignores the impact that "The Burden of Marine Lance Cpl. Matthew Snyder" had on Plaintiff. Defendants' utilization of the death of Matthew Snyder was not limited to his funeral. To publish comments on the Internet that a young man, whom Defendants had never met, was raised for the devil and taught to defy God can clearly be found to not only have inflicted emotional distress upon the father, Albert Snyder, but also to have invaded his privacy during a time of bereavement.[13] There was sufficient evidence in the trial record for a reasonable jury to conclude that Defendants' conduct unreasonably invaded Snyder's privacy and intruded upon his seclusion during a time of bereavement.

3. Civil Conspiracy

With respect to the civil conspiracy claim, Defendants did not dispute that there was an agreement to commit the acts at issue in this case. The jury was instructed that under Maryland law Plaintiff had to show that there was an agreement by at least two persons to accomplish an unlawful act, and that the act resulted in damages to Plaintiff. The jury was specifically instructed that it could not find Defendants liable for civil conspiracy unless it found them liable for either intentional infliction of emotional distress or invasion of privacy by intrusion upon seclusion. The jury, having returned a verdict against Defendants on both causes of action, clearly had sufficient evidence to return a verdict against Defendants on the claim of civil conspiracy. Specifically, there was evidence of the agreement to carry signs at the funeral containing certain messages the jury found to be directed at the Snyder family. In addition, there was evidence of Defendants' agreement to publish "The Burden of Marine Lance Cpl. Matthew Snyder" on the website of the Westboro Baptist Church.[14]

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[13] The evidence in the case clearly indicated that Albert Snyder did not seek to review the Defendants' pronouncements on the church website, www. godhatesfags. com. Snyder learned of this publication when noticing a reference to his son after running a search on Google.

Accordingly, because Plaintiff presented sufficient evidence for a reasonable jury to find in his favor on all three claims, Defendants' Motions for Judgment as a Matter of Law and Judgment Notwithstanding the Verdict are DENIED.

II. Motion to Amend the Judgment & Motion for Reconsideration

Next, Defendants have moved for reconsideration of "all counts, issues and theories" as well as an amendment of the judgment, pursuant to Rule 59 of the Federal Rules of Civil Procedure. (*Pro se* Defs.' Mem. Supp. Post-trial Mots. 1; Church Defs.' Mem. Supp. Post-trial Mots. 4.) As noted above, " 'reconsideration of a judgment after its entry is an extraordinary remedy which should be used sparingly.' " *Pacific Ins. Co.*, 148 F.3d at 403 (citation omitted). The Fourth Circuit has identified three grounds for amending an earlier judgment: "(1) to accommodate an intervening change in controlling law; (2) to account for new evidence not available at trial; or (3) to correct a clear error of law or prevent manifest injustice." *Id.* (citation omitted). Defendants have not presented any arguments with respect to new evidence or changes in the law. Instead, they argue that this Court made several clear errors of law and essentially allege manifest injustice.

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[14] Although both Phelps and Phelps-Davis testified that they had not actually read "The Burden of Marine Lance Cpl. Matthew Snyder" before Phelps-Roper placed it on the church's website, they condone the practice in general as an appropriate expression of their religious faith.

Defendants first challenge this Court's ruling on the constitutionality of their actions, arguing that this Court should have held as a matter of law that they were entitled to First Amendment protection. As discussed *supra*, however, the First Amendment does not offer absolute protection. Whether Defendants' actions constituted intentional infliction of emotional distress and invasion of privacy by intrusion upon seclusion were submitted to the jury, which clearly decided that Defendants' conduct was so outrageous as to constitute the commission of both of these wrongful acts.

Defendants argue also that this Court erred in denying their request for individualized *voir dire* of each potential juror. Under Rule 47(a) of the Federal Rules of Civil Procedure,

> [t]he court may permit the parties or their attorneys to examine prospective jurors or may itself do so. If the court examines the jurors, it must permit the parties or their attorneys to make any further inquiry it considers proper, or must itself as any of their additional questions it considers proper.

Fed.R.Civ.P. 47(a). Trial courts have broad discretion in the conduct of *voir dire. United States v. Bakker*, 925 F.2d 728, 733 (4th Cir.1991); *United States v. LaRouche*, 896 F.2d 815, 829 (4th Cir.1990). "[T]he only issue is whether [the] *voir dire* was sufficient to empanel an impartial jury." *LaRouche*, 896 F.2d at 830.

This Court took several measures to ensure that an unbiased jury would be empaneled. The parties requested, and this Court permitted, a jury questionnaire to be sent to all potential jurors, asking questions about their views on protesting, the military, the First Amendment of the United States Constitution, and other "screening" questions. As such questionnaires are rarely sent to potential jurors by this Court, this was an extraordinary precaution. These questionnaires were sent to several hundred individuals and the ultimate venire pool itself consisted of more than 100 people—more than triple the usual size of a venire pool in a civil case. The responses to the questionnaires were made available for all parties to review before trial. If the potential jurors' questionnaire responses indicated a bias towards or against one of the parties, they were stricken for cause by this Court during *voir dire*.

Every potential juror who indicated that he or she had some knowledge of the case was questioned individually at the bench, and many were stricken if they had already formed an opinion about the case. Where, as in this case, a trial has received pre-trial publicity, the Fourth Circuit has held that specific questioning regarding potential jurors' exposure to the publicity and what effect it had on their opinions was sufficient to remove any concerns about bias. *See Bakker*, 925 F.2d at 733. Thus, this Court's individualized questioning of the potential jurors about their knowledge of the case gave the parties ample opportunity to inquire about preconceived opinions. Furthermore, as most people in the venire pool were called to the bench at some point, the attorneys were able to question almost all of them individually. There was no error in the conduct of *voir dire* in this case.

Defendants Phelps-Roper and Phelps-Davis specifically allege manifest injustice. They argue that this Court was biased against them and created "an environment of such hostility" that a mistrial should have been ordered. (*Pro se* Defs.' Mem. Supp. Post-trial Mots. 20-21.) The Supreme Court has held that "the pejorative connotation of the terms 'bias' and 'prejudice' demands that they be applied only to judicial predispositions that go beyond what is normal and acceptable." *Liteky v. United States*, 510 U.S. 540, 552, 114 S.Ct. 1147, 127 L.Ed.2d 474 (1994). Thus, in *Liteky*, the Supreme Court held that a district court judge was not biased or prejudiced against the defendants during trial by asking questions of certain witnesses, admonishing defendants and counsel, adopting an "alleged 'anti-defendant tone,' " and cutting off testimony allegedly helpful to the defendants. *Id.* at 556, 114 S.Ct. 1147. The Supreme Court held that those actions by the trial judge "consist[ed] of judicial rulings, routine trial administration efforts, and ordinary admonishment (whether or not legally supportable) to counsel and to witnesses." *Id.* The Supreme Court further reasoned that the judge did not rely on knowledge acquired outside of the case proceedings or "display[ ] deep-seated and unequivocal antagonism that would render fair judgment impossible." *Id.*

In this case, as in *Liteky*, the *pro se* Defendants challenge certain comments made by this Court, specifically comments concerning their religion. First, no such comments were made in the presence of the jury. Second, none of the comments were grounded in any predisposed bias but rather reflected Defendants' own testimony concerning their religious beliefs and actions—information which came to light during the trial. The *pro se* Defendants also contend that this Court cut short their arguments and interrupted them on occasion. However, the *Liteky* Court made clear that this conduct is not grounded in bias or prejudice but rather falls into the category of "routine trial administration efforts." *Id.* The trial in this case was scheduled to take approximately eight to ten trial days and all parties were required to keep a rigorous pace to ensure the trial would end on time. This Court never asked any questions of any of the witnesses in this case. Accordingly, under the standards set forth by the Supreme Court concerning judicial bias, this Court finds that the motion for mistrial was appropriately denied, as no bias or prejudice towards the Defendants was evident.

Accordingly, Defendants' Motions to Amend the Judgment and for Reconsideration are DENIED.

III. Motion for New Trial and/or *Remittitur*

A. New Trial

Defendants also move for a new trial pursuant to Rule 59(a). A new trial should only be granted "if 1) the verdict is against the clear weight of the evidence, 2) is based on evidence which is false, or 3) will result in a miscarriage of justice, even though there may be substantial evidence which would prevent the direction of a verdict." *Dennis v. Columbia Colleton Med. Ctr., Inc.*, 290 F.3d 639, 650 (4th Cir.2002) (citations omitted). As to the second basis for a new trial, there is no contention that the verdict was based on false evidence. Thus, only the first and third bases will be addressed.

As discussed *supra*, there was sufficient evidence for a reasonable jury to return a verdict on Plaintiff's claims for intrusion upon seclusion, intentional infliction of emotional distress, and civil conspiracy. In considering the motions for a new trial, however, this Court may additionally consider the weight of the evidence and the credibility of the witnesses. *See Conner v. Schrader-Bridgeport Int'l, Inc.*, 227 F.3d 179, 200 (4th Cir.2000) (citation omitted). The events leading up to the March 10, 2006 funeral of Lance Cpl. Snyder are undisputed. The parties presented different evidence concerning the exact distance the protestors stood from St. John's Catholic Church and whether Plaintiff could see their signs from the funeral procession's route. However, Snyder testified that even though he saw the tops of the signs during the funeral procession, he did not see the signs' content until a news program later that day. It was undisputed at trial that he saw the content of "The Burden of Marine Lance Cpl. Matthew Snyder" online.

As to the third reason for granting a new trial, Defendants first argue that "under Maryland law, reference to religion to inflame the passions of the jury is improper and prejudicial, and should result in mistrial and/or a new trial." (*Pro se* Defs.' Mem. Supp. Post-trial Mots. 6; Church Defs.' Mem. Supp. Post-trial Mots. 7.) Defendants cite ***Tierco Maryland, Inc. v. Williams***, 381 Md. 378, 849 A.2d 504, 523 (2004), in which the Court of Appeals of Maryland held that "where the purpose of the reference to race, nationality, or religion is to inflame the passions of the jury, the reference is improper and prejudicial." In this case, however, Defendants themselves brought their religious beliefs into question by introducing evidence and arguments that their protest and the "epic" posted on the church's website were religious activities. Neither Plaintiff's counsel nor this Court "mock[ed] and attack [ed] . . . defendants' religious beliefs and practices" as Defendants contend. (*See pro se* Defs.' Mem. Supp. Post-trial Mots. 7.) If the trial "shifted to what Defendants believe" it was because Defendants have consistently argued that the content of their signs and the website publication constituted a religious message. (*See* Church Defs.' Mem. Supp. Post-trial Mots. 8.)

B. *Remittitur*

1. Compensatory Damages

Defendants argue that the compensatory damages awarded by the jury are excessive and require that this Court grant a new trial. Because Defendants variously cite to both federal and state law, this Court must first determine the appropriate standard under which to review Defendants' arguments.

In *Johnson v. Parrish*, 827 F.2d 988 (4th Cir.1987), the Fourth Circuit held that "the decision to set aside an excessive verdict and grant a new trial pursuant to Rule 59 is purely a matter of federal law." *Id.* at 991. The Supreme Court thereafter decided *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 116 S.Ct. 2211, 135 L.Ed.2d 659 (1996), in which it held that the doctrine of *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938), "precludes a recovery in federal court significantly larger than the recovery that would have been tolerated in state court." *Gasperini*, 518 U.S. at 430, 116 S.Ct. 2211. Therefore, a federal district court sitting in diversity must apply substantive state law standards when it considers a Rule 59(a) motion for a new trial based upon the alleged excessiveness of a jury's compensatory damage award. *Gasperini*, 518 U.S. at 430-31, 439, 116 S.Ct. 2211. Therefore, *Gasperini* requires that this Court apply Maryland substantive law in determining whether to reduce the amount of damages, notwithstanding the fact that the procedural elements of Rule 59(a) still apply.

Accordingly, this Court must first address the Maryland statutory cap on noneconomic damages. *See Gasperini*, 518 U.S. at 428, 116 S.Ct. 2211 ("We start from a point the parties do not debate. [Appellant] acknowledges that a statutory cap on damages would supply substantive law for *Erie* purposes."). Second, this Court must apply the Maryland standard to review the excessiveness of the compensatory damage award—to wit: whether the verdict is grossly excessive, shocks the conscience of the court, is inordinate, or is simply excessive.[15] *Owens-Corning v. Walatka*, 125 Md.App. 313, 725 A.2d 579, 590-91 (Md.Ct.Spec.App.1999).

a. Statutory Cap on Noneconomic Damages

Defendants' first argument in support of reducing the $2.9 million compensatory award is that it exceeds Maryland's statutory cap on noneconomic damages. In Maryland, a $500,000 cap applies to noneconomic damages for personal injuries arising after October 1, 1994. Md.Code Ann., Cts. & Jud. Proc. § 11-108(b)(2)(ii) (LexisNexis 2006) ("[I]n any action for damages for personal injury or wrongful death in which the cause of action arises on or after October 1, 1994, an award for noneconomic damages may not exceed $ 500,000."). The cap increases by $15,000 each October beginning in 1995. *Id.* § 11-108(b)(2)(ii). In this case, the cause of action accrued at the earliest on March 10, 2006, the date on which Lance Cpl. Snyder was laid to rest at St. John's Catholic Church in Westminster, Maryland. When Plaintiff's cause of action accrued, eleven years had passed since the $15,000 incremental increase took effect. Therefore, the statutory cap for present purposes is $665,000.

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[15] The Maryland standard differs from the federal standard, which is whether the award is "against the clear weight of the evidence, or based upon evidence which is false, or will result in a miscarriage of justice." *Cline v. Wal-Mart Stores, Inc.*, 144 F.3d 294, 305 (4th Cir.1998) (quoting *Atlas Food Sys. & Servs., Inc. v. Crane Nat'l Vendors, Inc.*, 99 F.3d 587, 594 (4th Cir.1996)).

The parties do not dispute that compensatory damages were awarded for purely noneconomic injury. The Maryland statutory cap, however, simply does not apply in this case. In *Cole v. Sullivan*, 110 Md.App. 79, 676 A.2d 85 (Md.Ct.Spec.App.1996), the Court of Special Appeals clearly held that the statutory cap found in section 11-108 does not apply to intentional torts. The court explained as follows:

> There are a plethora of cases in this and in other jurisdictions dealing with clauses in insurance policies excluding intentional misconduct. While we do not believe this exclusion of intentional misconduct from insurance coverage alone to be dispositive, the conspicuous absence of any discussion in § 11-108's legislative history of its application to intentional injuries convinces us that § 11-108 does not apply to intentional torts, whether or not personal bodily injuries are involved.

Id. at 92. The underlying causes of action in this case—intentional infliction of emotional distress and intrusion upon seclusion—are both intentional torts. The jury's compensatory award was therefore based solely on Defendants' intentional conduct, thereby placing it beyond the ambit of the statutory cap. Despite the unambiguous holding of Cole, Defendants make two additional arguments with respect to the statutory cap.

First, Defendants argue that because the Court of Appeals has never directly addressed the applicability of the statutory cap to intentional torts, this Court should certify the question for resolution by that court. See Md.Code Ann., Cts. & Jud. Proc. § 12-603 (LexisNexis 2006) ("The Court of Appeals of this State may answer a question of law certified to it by a court of the United States or by an appellate court of another state or of a tribe, if the answer may be determinative of an issue in pending litigation in the certifying court and there is no controlling appellate decision, constitutional provision, or statute of this State."). *Cole* is a "controlling appellate decision" under section 12-603, and, therefore, this Court finds no basis to certify the question to the Court of Appeals.

Second, Defendants contend that *Cole* was incorrectly decided. In diversity, this Court must apply the law of the state's highest court. In the absence of a controlling decision from the highest state court, this Court should follow the decisions of the intermediate appellate court unless it is "'convinced by other persuasive data that the highest court of the state would decide otherwise.' " *Comm. v. Estate of Bosch*, 387 U.S. 456, 465, 87 S.Ct. 1776, 18 L.Ed.2d 886 (1967) (quoting *West v. Am. Tel. & Tel. Co.*, 311 U.S. 223, 237, 61 S.Ct. 179, 85 L.Ed. 139 (1940)). The absence of a decision by the Court of Appeals that is directly on point does not equate to uncertainty in Maryland law. The Court of Appeals exercises discretionary jurisdiction by granting writs of *certiorari*, and the court's silence on a particular issue, such as the applicability of the statutory cap to intentional torts, indicates approval of the line of cases addressing it in the lower state courts, including the Court of Special Appeals. More importantly, *Cole* has not received a single negative citing reference in the decade since it was decided.[16] In sum, the Maryland statutory cap on noneconomic damages does not apply to intentional acts such as intentional infliction of emotional distress and invasion of privacy by intrusion upon seclusion.

b. Factual Basis for Compensatory Award

Aside from their argument with respect to the statutory cap, Defendants argue that the evidence does not warrant a compensatory award of $2.9 million. Under Maryland law, a compensatory damage award should be reduced if "the verdict is 'grossly excessive,' or 'shocks the conscience of the court,' or is 'inordinate' or 'outrageously excessive,' or even simply 'excessive.' " *Banegura v. Taylor*, 312 Md. 609, 541 A.2d 969, 976 (1988) (citing *Dagnello v. Long Island Railroad Co.*, 289 F.2d 797, 802 (2d Cir.1961); *Conklin v. Schillinger*, 255 Md. 50, 257 A.2d 187, 197 (1969)). The Court of Appeals has stated that "all of these formulae mean substantially the same thing, . . . that the damages are 'such as all mankind must be ready to exclaim against, at first blush. . . . " *Conklin*, 257 A.2d at 197 (internal citations omitted).

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[16] The only appellate case in Maryland that cites to *Cole v. Sullivan* on this issue is *Anchor Packing Co. v. Grimshaw*, 115 Md.App. 134, 692 A.2d 5, 15 (Md.Ct.Spec.App.1997), in which the Court of Special Appeals reiterated that "in *Cole v. Sullivan*, . . . we held that . . . § 11-108 does not apply to awards stemming from the commission of intentional torts."

In reviewing the excessiveness of a compensatory damages award, Maryland trial courts are afforded broad discretion to determine whether the jury's award should be reduced. *See Banegura*, 541 A.2d at 976 ("We know of no case where this Court has ever disturbed the exercise of the lower court's discretion in denying a motion for new trial because of the inadequacy or excessiveness of damages." (quoting *Kirkpatrick v. Zimmerman*, 257 Md. 215, 262 A.2d 531, 532 (1970))). In turn, the trial court is expected to afford great deference to the decision of the jury and to reduce the compensatory damage award only rarely.[17] Indeed, the trial court "should extend the fullest consideration possible to the amount returned by the jury before it concludes that it shocks his conscience, is grossly excessive, or is excessive." *Conklin*, 257 A.2d at 197 (internal quotations omitted). In *Buck v. Cam's Broadloom Rugs*, 328 Md. 51, 612 A.2d 1294 (1992), the Court of Appeals explained as follows:

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[17] Although, as noted above, this Court applies state substantive law in determining the excessiveness of a compensatory damage award, it is instructive that the Fourth Circuit has explained that "[c]ourts defer to a jury's award of damages for intangible harms, such as emotional distress, 'because the harm is subjective and evaluating it depends considerably on the demeanor of the witnesses.' " *Fox v. Gen. Motors Corp.*, 247 F.3d 169, 180 (4th Cir.2001) (internal citations omitted).

> [A] jury's verdict should not be casually overturned. In our system of justice, the jury is sacrosanct and its importance is unquestioned. The members of a jury see and hear the witnesses as they testify. They watch them as they sweat, stutter, or swagger under the pressure of cross-examination. This enables the jury to develop a feel for the case and its personal dynamics which cannot be conveyed by the cold printed page of a record reproduced for appellate review.

Id. at 1298-99 (*quoting Boscia v. Massaro*, 365 Pa.Super. 271, 529 A.2d 504, 508 (Pa.1987)).

Maryland courts have considered the corresponding awards given in comparable cases as a factor in determining whether a particular award is excessive. The parties in this case have not provided, nor has this Court been able to locate, another case with facts sufficiently similar to justify a direct comparison. This is of little consequence, however, because "while comparison to other similar cases is helpful, a review of the specific evidence presented to the jury, rather than a mathematical analysis, more appropriately enables [a court] to determine whether the award was shocking."[18] *Owens Corning v. Bauman*, 125 Md.App. 454, 726 A.2d 745, 779-80 (Md.Ct.Spec.App.1999). This Court finds that the jury's compensatory award does not "shock the conscience" based on the evidence presented in this case. Plaintiff clearly demonstrated emotional injury which he will continue to suffer.

By finding in favor of Plaintiff and awarding him $2.9 million in compensatory damages, the jury based its finding on several expert witnesses. Plaintiff's treating physician, Dr. Scott Russell Mann, testified that Plaintiff had difficulty sleeping because "he keeps thinking about how the protestors ruined his son's funeral." (Trial Tr. 104, Oct 23, 2007.) He also testified that Plaintiff had trouble concentrating, lacked energy, and demonstrated other signs of depression due to the "emotional turmoil resulting from the protestors." (*Id.* at 105-06.) Dr. Mann testified that his "assessment was that his depression was not adequately controlled with [the] ongoing stressors related to the death of his son and to subsequent actions by [Defendants]," (*id.* at 122) and that his "medical opinion is that [Plaintiff] has not done well with his grieving process because of

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[18] Although the Fourth Circuit has directed district courts to apply a series of factors in determining whether a compensatory award for emotional injury is excessive, *see Knussman v. Maryland*, 272 F.3d 625, 640 (4th Cir.2001) (citing *Price v. City of Charlotte*, 93 F.3d 1241, 1254 (4th Cir.1996)), Maryland has not adopted a comparable factor-based test.

[Defendants]." (*Id.* at 124-25.) Dr. Mann concluded as follows:

> I am of the opinion that [the Plaintiff] had an exacerbation of his depression because of [the Defendants'] actions and [the Plaintiff's] inability to go through the normal grieving process. [The Plaintiff] was in a very sensitive state at the time of his son's death. Normally a funeral helps get some closure and the support of the community and friends at that time helps with that closure and the interruption of that with negative feelings and negative emotions being brought up really just stops that healing process and because of that, [the Plaintiff's] had a lot of difficulty with his depression. . . .

(*Id.* 130.)

Dr. Mann recommended that Plaintiff seek treatment by Dr. Jeffrey Willard, a psychologist. Dr. Willard testified at trial that "[m]y opinion is that the demonstration and the things that [Plaintiff] talked about [seeing] in the website [*i.e.* "The Burden of Marine Lance Cpl. Matthew Snyder"] have made the depression worse and lengthened it." (*Id.* at 158-59.) Dr. Willard's testimony corroborated Plaintiff's testimony with respect to his reaction to the publication on the website. Additionally, Chaplain Major Terry Callis testified that the Plaintiff's trauma, although typical in the context of a military funeral, was exacerbated by "the [D]efendants being . . . in the proximity of the funeral itself and then the later news broadcasts [and] Mr. Snyder seeing the events on television and reading them in the paper. The events that seem to overshadow the honor and dignity that should have been prescribed to the funeral service of his son." (Trial Tr. 507, Oct 25, 2007.)

The jury also undoubtedly relied on the testimony of the Plaintiff, Albert Snyder. During his emotional testimony at trial, Plaintiff recounted fond memories of his son, Matthew Snyder, and the traumatic news of his passing. He described the severity of his emotional injury, stating that he is often tearful and angry, and that he becomes so sick to his stomach that he actually physically vomits. (Trial Tr. 226, 244, Oct 24, 2007.) He testified that Defendants placed a "bug" in his head, (*id.* at 226), such that he is unable to separate thoughts of his son from the Defendant's actions: "there are nights that I just, you know, I try to think of my son at times and every time I think of my son or pass his picture hanging on the wall or see the medals hanging on the wall that he received from the [M]arine [C]orps, I see those signs." (*Id.* at 234.) He testified also that "I want so badly to remember all the good stuff and so far, I remember the good stuff, but it always turns into the bad." (*Id.* at 253.)

Plaintiff also testified as to the permanency of the emotional injury. He testified that "I think about the sign [*i.e.* Thank God for dead soldiers] every day of my life. . . . I see that sign when I lay in bed at nights.

I have one chance to bury my son and they took the dignity away from it. I cannot re-bury my son. And for the rest of my life, I will remember what they did to me and it has tarnished the memory of my son's last hour on earth." (*Id.* at 228.) He stated also that "somebody could have stabbed me in the arm or in the back and the wound would have healed. But I don't think this will heal." (*Id.* at 259.)

Throughout trial, Plaintiff demonstrated significant emotion, appearing visibly shaken and distressed, and was often reduced to tears. On occasion during the trial, Plaintiff requested and was granted leave from the courtroom to compose himself. The jury witnessed firsthand Plaintiff's anguish and the unresolved grief he harbors because of the failure to conduct a normal burial.

This Court is obviously cognizant of the large sum awarded in this case. Nonetheless, it is not the province of this Court in a post-trial motion challenging a damage award to simply insert its own judgment for that of the jury. Instead, this Court is tasked with giving the "fullest consideration" to the judgment of the jury. *Conklin*, 257 A.2d at 197. It is with this principle in mind that this Court concludes that a compensatory award of $2.9 million does not shock the conscience.

2. Punitive Damages

Having found that the jury's award for $2.9 million in compensatory damages does not shock the conscience and must be upheld, this Court must determine whether the jury's punitive award should be reduced. The jury awarded a total of $8 million in punitive damages: $500,000 against each Defendant on the intentional infliction of emotional distress claim and $1.5 million against each Defendant on the intrusion upon seclusion claim.

Defendants initially argue that "actual malice" is insufficiently defined under Maryland case law and that, even if it were sufficiently defined, this Court's jury instructions did not adequately define the term. Their arguments are without merit. Maryland case law adequately defines actual malice as a "sense of evil or wrongful motive, intent to injure, ill will, or fraud." *Tierco Md., Inc. v. Williams*, 381 Md. 378, 849 A.2d 504, 526 n. 29 (2004) (quoting *Bowden v. Caldor*, 350 Md. 4, 710 A.2d 267, 276 (1998)); *see also Montgomery Ward v. Wilson*, 339 Md. 701, 664 A.2d 916, 930 n. 5 (1995) (defining actual malice as "conduct characterized by evil or wrongful motive, intent to injure, knowing and deliberate wrongdoing, ill will or fraud"). This Court, in conformity with Maryland law, instructed the jury that "[a]n act is done maliciously if it is done with a sense of hate, ill-will, spite, or a desire to inflict unnecessary injury," and therefore there is no basis to set aside the punitive damages award based on inadequate jury instructions.

Next, Defendants argue that the punitive damage award is excessive and violates the Due Process Clause of the Fifth Amendment pursuant to the principles set forth by the Supreme Court in *BMW of North America*, *Inc. v. Gore*, 517 U.S. 559, 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996), and *Philip Morris USA v. Williams*, 549 U.S. 346, 127 S.Ct. 1057, 166 L.Ed.2d 940 (2007). Alternatively, the Defendants argue that the punitive damages award is unsupported by the record.

a. Constitutional Limits on Punitive Damages

In *Gore*, the Supreme Court set forth three guideposts to review a punitive award for excessiveness: "(1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases."[19] *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 418, 123 S.Ct. 1513, 155 L.Ed.2d 585 (2003) (discussing the *Gore* factors).

As to the first guidepost, the Supreme Court has stated that "the most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct." *Gore*, 517 U.S. at 575, 116 S.Ct. 1589. Determining the degree of reprehensibility, however, requires weighing a non-exhaustive list, including whether: "the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident." *Campbell*, 538 U.S. at 419, 123 S.Ct. 1513 (citing *Gore*, 517 U.S. at 576-77, 116 S.Ct. 1589). "The existence of any one of these factors weighing in favor of a plaintiff may not be sufficient to sustain a punitive damages award; and the absence of all of them renders any award suspect." *Campbell*, 538 U.S. at 419, 123 S.Ct. 1513.

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[19] In their post-trial submissions, Defendants rely principally on *Bowden v. Caldor, Inc.*, 350 Md. 4, 710 A.2d 267 (1998), in which the Court of Appeals of Maryland adopted the constitutional safeguards set forth in *Gore* as part of Maryland common law. *See Bowden*, 710 A.2d at 278 ("[T]he legal principles . . . applicable to judicial review of punitive damages awards for excessiveness . . . are set forth as principles of Maryland common law."). This Court will treat the guideposts delineated in *Gore* as constitutional restraints, not as aspects of Maryland common law.

Defendants have a constitutional right to express their religious beliefs and to demonstrate on public streets. Defendants' conduct in this case, however, went beyond the bounds of civil discourse, to the point that their conduct was reprehensible. The jury in this case had more than a sufficient basis to find that displaying signs such as "Thank God for dead soldiers," "You are going to hell," and "God hates you," at a young Marine's funeral was reprehensible. The jury also had more than a sufficient basis to find that the online publication of "The Burden of Marine Lance Cpl. Matthew Snyder," which declared, *inter alia*, that he had been "raised for the devil," was reprehensible. In short, utilizing Matthew

Snyder's death as a vehicle for hateful expression was sufficient to support a punitive damages award.

While Defendants' conduct was reprehensible and justified an award of punitive damages, this Court must address the amount of that punitive damage award. Some of the factors cut in favor of a large punitive award. For example, the Supreme Court noted that large punitive awards may be warranted where the plaintiff was "financially vulnerable." *Gore*, 517 U.S. at 576, 116 S.Ct. 1589. In *Gore*, the plaintiff's injuries were economic in nature, namely, the reduction in value of the plaintiff's automobile. *Id.* at 563-64, 116 S.Ct. 1589. In this case, however, the Plaintiff's injury was noneconomic, and, therefore, his financial vulnerability is irrelevant. Nonetheless, the emotional vulnerability of a particular plaintiff is likewise a vital consideration, especially in this case, where Plaintiff was in a state of bereavement, having just buried a son killed in military service. As this case ably demonstrates, reprehensible conduct may manifest itself in noneconomic injury. Defendants' conduct was also plainly intentional and demonstrated an indifference to Plaintiff's health.

Yet other factors do not necessarily weigh in favor of sustaining the entire award. Defendants' conduct at the funeral was not repetitive. Although the "epic" of Matthew Snyder remained on the church website for a considerable period of time, there was no evidence at trial of any additional publications directed at the Snyder family. There was no evidence at trial of any additional publications. Furthermore, although Plaintiff suffered significant emotional injury, the physical injury-exacerbation of a preexisting diabetic condition-was comparably minimal.

As to the second guidepost, the disparity between the actual and potential harm, the Supreme Court has refused to draw a "mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable" punitive awards. *Id.* at 582-83, 116 S.Ct. 1589 (quoting *Pac. Mut. Life Ins. Co. v. Haslip,* 499 U.S. 1, 18, 111 S.Ct. 1032, 113 L.Ed.2d 1 (1991)). Indeed, the Supreme Court explained that "low awards of compensatory damages may properly support a higher ratio than high compensatory awards, if, for example, . . . the injury is hard to detect or the monetary value of noneconomic harm might have been difficult to determine." *Id.* at 582, 116 S.Ct. 1589. This case, however, did not result in low compensatory damages. Moreover, an $8 million punitive award, in relation to the $2.9 million compensatory award, is plainly within the permissible constitutional ratio. A ratio of four to one has been cited by the Supreme Court as being "close" to constitutionally excessive, *Haslip*, 499 U.S. at 23-24, 111 S.Ct. 1032, and the same ratio was again cited in *Gore*, 517 U.S. at 581, 116 S.Ct. 1589. *See also Campbell*, 538 U.S. at 425, 123 S.Ct. 1513 (finding that "[s]ingle-digit multipliers are more likely to comport with due process").

The third guidepost involves "[c]omparing the punitive damages award and the civil or criminal penalties that could be imposed for comparable misconduct." *Gore*, 517 U.S. at 583, 116 S.Ct. 1589. In 2006, the Maryland General Assembly passed legislation providing that "[a] person may not engage in picketing activity within 100 feet of a funeral, burial, memorial service, or funeral procession that is targeted at one or more persons attending the funeral, burial, memorial service, or funeral procession." Md.Code Ann., Crim. Law § 10-205(c) (LexisNexis 2006). A violation of this provision constitutes a misdemeanor and subjects the individual to "imprisonment not exceeding 90 days or a fine not exceeding $1,000 or both." *Id.* § 10-205(d).

Defendants argue that this provision clearly mandates a reduction in the punitive award. This guidepost, although clearly relevant, provides less guidance than Defendants claim. First, the statute, which took effect on October 1, 2006, could not have provided Defendants with any fair notice of appropriate civil punishment because they protested Matthew Snyder's funeral on March 10, 2006. A reduction of the punitive award based solely on the retroactive application of a comparable criminal penalty is unwarranted, especially under the guise of fair notice. Second, Defendants have made their intention to continue to protest funerals well known, and the maximum statutory punishment-imprisonment for ninety days and a $1,000 fine—is unlikely to deter any of the Defendants from similar conduct in the future.[20]

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[20] Indeed, representatives of the Westboro Baptist Church have returned to Maryland in the aftermath of the verdict in this case. In December 2007, five members of a

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Defendants also contend that the Supreme Court's most recent decision on punitive damages, *Philip Morris USA v. Williams*, 549 U.S. 346, 127 S.Ct. 1057, 166 L.Ed.2d 940 (2007), requires a reduction. In *Philip Morris USA*, the Supreme Court held that "the Constitution's Due Process Clause forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties or those whom they directly represent, *i.e.*, injury that it inflicts upon those who are, essentially, strangers to the litigation." *Id.* at 1063. The Supreme Court, however, reaffirmed that plaintiffs may show harm to nonparties to demonstrate "a different part of the punitive damages constitutional equation, namely, reprehensibility." *Id.* at 1063-64. Therefore, while a jury may consider harm to others as evidence of reprehensibility, it may not punish a defendant for the harm actually done to those nonparties.

The *Philip Morris USA* decision is inapplicable. In that case, plaintiff's counsel argued to the jury in the punitive damages portion of the underlying trial to "think about how many other [cigarette smokers] in the

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Maryland family were killed on an Ohio highway after a truck traveling in the wrong direction struck their vehicle. Three members of the Westboro Baptist Church demonstrated at their funeral, which was held in Maryland, contending that the deaths of these five Marylanders were God's punishment against the Maryland community for the jury verdict in this case. *Westboro Links Family's Deaths to $11M Verdict*, Assoc. Press, The Daily Record, Jan. 8, 2008, at 8A.

last 40 years in the State of Oregon there have been. . . . In Oregon, how many people do we see outside, driving home . . . smoking cigarettes? . . . [C]igarettes . . . are going to kill ten [of every hundred]. [And] the market share of Marlboros [*i.e.*, Philip Morris] is one-third [*i.e.*, one of every three killed]." *Id.* at 1061. In light of this argument, the Supreme Court was concerned about the reference to past harm to third parties. In this case, Plaintiff's counsel did not refer to any other prior injuries inflicted by Defendants. Instead, Plaintiff's counsel argued for a punitive award that is

> proportionate [to the harm] and appropriate that says don't do this in Maryland again. Do not bring your circus of hate to Maryland again. That no son or daughter of Maryland shall have [his or her] funeral defiled by the malicious tactics of the [D]efendants again and that no future father or mother suffers this.

(Tr. of Punitive Arg. 9.) Plaintiff's counsel did not mention *past* harm to third parties, only *future* harm to third parties. The reference to future harm is necessary in addressing the deterrent value of the punitive award, especially where, as here, the reference is only to future conduct within the state. *See Philip Morris USA*, 127 S.Ct. at 1059 (reaffirming that "[t]his Court has long made clear that '[p]unitive damages may properly be imposed to further a State's legitimate interests in punishing unlawful conduct and deterring its repetition' " (citing *Gore*, 517 U.S. at 568, 116 S.Ct. 1589)).

Under the constitutional guideposts as set forth by the Supreme Court in *Gore*, this Court finds that a reduction in the total punitive damages award is necessary. Because this reduction, set forth below, is based on constitutional principles, this Court will not offer the Plaintiff the option of a new trial. *See Johansen v. Combustion Eng'g., Inc.*, 170 F.3d 1320, 1331 (11th Cir.1999).

b. Application of *Bowden v. Caldor, Inc.*

In addition to the constitutional principles that this Court has already discussed, the Court of Appeals has added several other factors that are relevant only under state law. In *Bowden v. Caldor, Inc.*, 350 Md. 4, 710 A.2d 267 (1998), the Court of Appeals identified nine "legal principles or considerations which should guide a trial court in determining if a punitive damages award is excessive." *Id.* at 277. Three of the nine considerations are substantially the same as the *Gore* guideposts already discussed, and therefore need not be addressed again under state law. The remaining six factors are as follows: 1) the defendant's ability to pay; 2) the deterrent value of the punitive damages award; 3) punitive damages awarded in comparable cases; 4) other punitive damages awarded against the same defendant; 5) whether the punitive damages were for separate torts arising out of the same incident; and 6) the plaintiff's costs and expenses. *Id.* at 278-83.

Initially, two of these additional six factors are not applicable in this case. This Court has not been made aware of other punitive awards against these Defendants. Furthermore, evidence at trial indicated that Plaintiff did not personally bear all of the financial costs of the lawsuit. *See* http:// www. matthewsnyder. org/ help. html (last visited Feb. 1, 2008) (collecting donations from the public and stating that "[n]o money is being paid to the attorneys for the family, who have agreed to undertake this case on a *pro bono* . . . basis").

The jury awarded punitive damages based on two separate torts—intentional infliction of emotional distress and intrusion upon seclusion—based on the same incidents, *i.e.*, the funeral protest and the subsequent publication of "The Burden of Marine Lance Cpl. Matthew Snyder." Therefore, the punitive award was clearly for separate torts arising out of the same incident. This Court takes that factor into account in addressing a reduction of the punitive damages award.

With respect to the third factor listed in the *Bowden* case, there are simply no punitive awards in comparable cases. The parties have not submitted to this Court any case with which to compare the punitive award, and this Court has been unable to find a Maryland case with any close factual similarity. Acknowledging that there is not a comparable case, Defendants have instead pointed more generally to a passage in *Bowden* in which the Court of Appeals determined that the largest award of punitive damages upheld by that court was $700,000. *Bowden*, 710 A.2d at 281. The Court of Special Appeals, however, had upheld much larger awards prior to *Bowden*. *See Potomac Elec. Power Co. v. Smith*, 79

Md.App. 591, 558 A.2d 768 (Md.Ct.Spec.App.1989) ($7.5 million); *Exxon Corp. v. Yarema*, 69 Md.App. 124, 516 A.2d 990 (Md.Ct.Spec.App.1986) ($910,000). The purpose of looking to comparable case law, however, is not to put a strict, judicially-created cap on the size of a punitive award.

The first and second principles set forth in the *Bowden* case—Defendants' ability to pay and the deterrent effect of the award—require discussion. It is quite clear that the punitive damages award in this case has had no deterrent effect on Defendants. In addition to three members of the Westboro Baptist Church arriving in Maryland to celebrate the death of innocent Maryland car accident victims, *see supra* note 20, Defendants have continued to express their intent to appear and make their presence felt at the funerals of service men and women killed in the line of duty.

The key factor to be addressed by this Court is Defendants' ability to pay the punitive damages award. This factor is set forth by the Court of Appeals in *Bowden*, and it is also reflected in the constitutional standards noted above. In applying either a constitutional or state common law standard, it is clear to this Court that if a punitive damage award is excessive, it is this Court's obligation to order a reduction of that award.

During pre-trial discovery, Plaintiff sought Defendants' financial records in order to explore a claim for punitive damages. This Court granted Defendants' motion in opposition to the pre-trial disclosure of such information, but required that those records be submitted to this Court *in camera* to be held under seal pending the verdict of the jury. On the verdict form in which the jury awarded $2.9 million in compensatory damages, the jury also answered affirmatively to every question with respect to whether punitive damages should be awarded. Accordingly, as discussed with counsel prior to the commencement of trial, this Court then released Defendants' financial statements for review by Plaintiff.[21] (*See* Court's Ex. 1 (Paper No. 197).) This Court then allowed a period of time for the parties to prepare additional arguments to the jury, which were then presented on the issue of punitive damages. After a second round of deliberations, the jury awarded total punitive damages of $8 million against Defendants. This punitive damages award was apportioned by the jury on a separate verdict sheet as follows:

Invasion of Privacy by Intrusion upon Seclusion:

Subtotal: $6 million

Apportioned among the following Defendants:

Fred W. Phelps, Sr.:	$1.5 million

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[21] The financial statements were submitted under oath by Defendants Shirley L. Phelps-Roper, Rebekah A. Phelps-Davis, and Fred W. Phelps, Sr. Timothy B. Phelps, clerk of Defendant Westboro Baptist Church, Inc., submitted the financial statement of the church under oath as its corporate representative.

Westboro Baptist Church:	$1.5 million
Shirley L. Phelps-Roper:	$1.5 million
Rebekah A. Phelps-Davis:	$1.5 million

Intentional Infliction of Emotional Distress:

Subtotal: $2 million

Apportioned among the following Defendants:

Fred W. Phelps, Sr.:	$500,000
Westboro Baptist Church:	$500,000
Shirley L. Phelps-Roper:	$500,000
Rebekah A. Phelps-Davis:	$500,000

Defendant Westboro Baptist Church, Inc. submitted a financial statement indicating a net worth of $386,952. The evidence at trial indicated that fifty of the roughly sixty or seventy members of the church are related to Defendant Phelps by blood or marriage. The church is routinely financed by its members in support of various activities, including maintaining a website, producing videos at an onsite production facility, manufacturing signs at an onsite sign shop, and traveling around the country to broadcast the church's message. In short, the Westboro Baptist Church, Inc. is a well-financed corporation with a continuing source of funds to support its activities. The award of $500,000 in punitive damages as to the claim for intentional infliction of emotional distress was not excessive. The website of the church broadcast "The Burden of Marine Lance Cpl. Matthew Snyder" and the sign shop of the church produced signs which were personally directed at the Snyder family. While this Court does not find that $500,000 award of punitive damages to be excessive, the second award of $1.5 million on the invasion of privacy claim is excessive. In light of somewhat duplicative nature of the two claims as to damages, this Court finds that a second award of $500,000 in punitive damages would be within the bounds of the standards set forth by the Supreme Court and reiterated by the Court of Appeals of Maryland. *See BMW of North Am., Inc. v. Gore*, 517 U.S. 559, 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996); *Bowden v. Caldor, Inc.*, 350 Md. 4, 710 A.2d 267 (1998). Accordingly, the total award of punitive damages as to Defendant Westboro Baptist Church, Inc. is reduced from $2 million to $1 million.

Defendant Fred W. Phelps, Sr., submitted a financial statement indicating a net worth of $231,129. That net worth is represented totally by equity in property that he has indicated is owned jointly with his spouse. While the evidence indicates that Phelps is the Pastor of the Westboro Baptist Church and is involved in all of the church's activities as the titular head of the family, there was no evidence that he was actively involved in the publication of "The Burden of Marine Lance Cpl. Matthew Snyder" on the church's website. This Court finds that a total award of $300,000 in punitive damages is appropriate as to Phelps. This award will apportioned in the amounts of $150,000 on the intentional infliction of emotional distress claim and $150,000 on the invasion of privacy claim. This Defendant's actions were not as egregious as those of his daughter, Shirley L. Phelps-Roper, and a total award of $300,000 is more appropriate in light of his stated net worth. Therefore, the total punitive damages award of $2 million against Defendant Fred W. Phelps, Sr. shall be reduced to $300,000.

Defendant Rebekah A. Phelps-Davis stands in a similar position to her father. There was no evidence that she actively participated in the publication of "The Burden of Marine Lance Cpl. Matthew Snyder." Like her father, though, she certainly entered into the agreement to engage in the subject activities and to travel to Maryland. She has claimed a total net worth of $107,890, although it appears that she reduced the asset portion of her statement by claiming only a one-half interest in her residence. Nevertheless, this Court finds Phelps-Davis's culpability is somewhat less than that of her father, and she is also comparatively less able to pay the award. Accordingly, the punitive damages award of $2 million against Defendant Rebekah A. Phelps-Davis is reduced to a total of $200,000, reflecting a $100,000 punitive damage award for each substantive claim.

The evidence in this case clearly indicated a far more aggressive posture on the part of Defendant Shirley L. Phelps-Roper. In traveling to Maryland with her father and sister to picket Lance Cpl. Snyder's funeral, Phelps-Roper brought four of her children with her. At trial, she proudly noted that she authored "The Burden of Marine Lance Cpl. Matthew Snyder," which was broadcast on the church's website. In light of her leadership role in these activities, this Court finds that the punitive damage award against Phelps-Roper should be larger than the awards against her father and sister. Phelps-Roper filed a personal financial statement indicating a total net worth of $271,357. This Court finds that a total punitive damages award of $600,000 against her is within the standards enunciated by the Supreme Court and the Court of Appeals of Maryland. Accordingly, the total punitive damage award of $2 million against Defendant Shirley L. Phelps-Roper is reduced to $600,000, which reflects a $300,000 punitive damage award as to each substantive claim.

Therefore, in reviewing the relative culpability of each Defendant and the respective financial statements, this Court reduces the total punitive damage award in this case from $8 million to $2.1 million. The punitive damage award is specifically apportioned in the amount of $1 million as to Defendant Westboro Baptist Church, Inc., $600,000 as to Defendant Shirley L. Phelps-Roper, $300,000 as to Defendant Fred W. Phelps, Sr., and $200,000 as to Defendant Rebekah A. Phelps-Davis.

IV. Motion for Relief

Next, Defendants have moved under Rule 60 of the Federal Rules of Civil Procedure for relief from judgment. Under Rule 60, this Court has discretion to relieve Defendants from the final judgment when any of the following can be shown:

> (1) mistake, inadvertence, surprise, or excusable neglect;
>
> (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);
>
> (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;
>
> (4) the judgment is void;
>
> (5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or
>
> (6) any other reason that justifies relief.

Fed.R.Civ.P. 60(b). As discussed in Part II, *supra*, Defendants have not shown the existence of any mistakes, and new evidence has not been introduced. Thus, the first two grounds for granting relief have not been met. In addition, Defendants have not raised any specific arguments why they should be afforded relief based on the remaining grounds. Defendants have not demonstrated fraud or misconduct by Plaintiff, established that the judgment is void, or indicated that the judgment was already satisfied or based on an earlier judgment. Finally, this Court finds no other reason why Defendants should be relieved from the judgment. As discussed in Part III, *supra*, the amount of punitive damages is already being reduced to protect Defendants' due process rights. Accordingly, Defendants' Motions for Relief from Judgment pursuant to Rule 60(b) are DENIED.

V. Motion to Stay

Finally, Defendants move to stay execution of the judgment pursuant to Local Rule 110(1)(a) and Rule 62 of the Federal Rules of Civil Procedure. Rule 62(b) permits a stay pending the disposition of post-trial motions made pursuant to Rules 50, 52(b), 59, and 60. Because this Memorandum Opinion and the accompanying Order decide each pending post-trial motion filed by Defendants, their motions for stay under Rule 62(b) are moot.

In contrast, under Rule 62(d), Defendants may obtain a stay of judgment while their appeal to the Fourth Circuit is pending. Although Rule 62(d) is silent as to the amount of the supersedeas bond, Local Rule 110(1)(a) of this Court requires that the supersedeas bond shall be 120% of the monetary judgment, plus an additional $500 to cover costs.[22] This Court has the discretion, however, to permit something other than a supersedeas bond to secure the judgment or simply require a bond in a different amount. *See* Local Rule 110(1)(a) (D.Md.2008).

Defendants have requested a stay without the necessity of posting a bond. (*See Pro se* Defs.' Mot. Stay 7; Church Defs.' Mot. Stay 6.) This Court is not inclined to grant a stay in this case without the posting of any security for the judgment by these Defendants. Therefore, this Court withholds ruling on Defendants' motion to stay pending a showing of their ability to procure a supersedeas bond or other means to secure the total judgment in this case of $5 million, reflecting $2.9 million in compensatory damages and $2.1 million in punitive damages.

CONCLUSION

For the foregoing reasons, the Motions for Judgment as a Matter of Law, Motions for Judgment Notwithstanding the Verdict, Motions for Reconsideration and Rehearing, Motions to Alter or Amend the Judgment, Motions for New Trial, Motions for Relief from Judgment, Motions for Any Other Relief in Law and Equity Warranted under the Facts and Law filed by Fred W. Phelps, Sr., Westboro Baptist Church, Inc., Shirley L. Phelps-Roper, and Rebekah A. Phelps-Davis are DENIED. Defendants' Motions for *Remittitur* are DENIED in part and GRANTED in part. Specifically, the motions are DENIED with respect to the compensatory damage award of $2.9 million, but GRANTED in part with respect to the total punitive damage award of $8 million, which is hereby reduced to $2.1 million. Accordingly, the total damage award in this case is reduced from $10.9 million to $5 million.

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[22] The Rule states "[u]nless otherwise ordered by the Court, the amount of any supersedeas bond filed to stay execution of a money judgment pending appeal shall be 120% of the amount of the judgement plus an additional $500 to cover costs on appeal." Local Rule 110(1)(a) (D.Md.2008).

With respect to the Motions to Stay execution of the Judgment filed by all Defendants, this Court withholds ruling pending further proceedings. A separate Orders follows.

Date: February 4, 2008

/s/ ____________________
Richard D. Bennett
United States District Judge

OPPOSITION BRIEF

Supreme Court, U.S.
FILED
JAN 20 2010
OFFICE OF THE CLERK

No. 09-751

IN THE
Supreme Court of the United States

ALBERT SNYDER,
Petitioner,
v.

FRED W. PHELPS, SR.; SHIRLEY L. PHELPS-ROPER;
REBEKAH A. PHELPS-DAVIS;
AND, WESTBORO BAPTIST CHURCH, INC.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether petitioner fails to present an issue worthy of consideration by this Court, because:

1. **This case does not involve private matters, and this Court has already established that speech on public matters is protected.**

2. **This case does not present the question of whether funeral goers are a captive audience or have the right to avoid unwanted communication because respondents picketed over 1,000 feet from a funeral that was a highly public event, on a public right of way, engaging in speech on public issues; were not seen by those going in; and did not impact or disrupt the funeral in any slightest degree.**

3. **There is no split in the circuits relevant to this case, because this case is not about whether laws limiting the time, place and manner of funeral pickets are constitutional.**

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STATEMENT OF THE CASE

The Fourth Circuit Court of Appeals set aside a verdict of $5 million (remitted from $10.9 million) against a small church, her pastor, and two of her members (respondents), which was rendered on theories of intentional infliction of emotional distress and invasion of privacy by intrusion upon seclusion, because respondents held some picket signs over 1,000 feet away from a church where a funeral was held, before the funeral started, which none of the funeral goers saw, addressing issues of vital public importance. Now petitioner – the father of the soldier being buried – wants this Court to review that decision and set aside well-settled First Amendment law, because the father did not like the words.

The signs held by the three individual respondents, and four children of one of the respondents, were these: Don't Pray for the USA; God Hates Fags; God Hates You; God Hates America; God's View/Not Blessed Just Cursed; Semper Fi Fags; Pope in Hell; God Hates the USA/Thank God for 911; You are Going to Hell; Fag Troops; Thank God for Dead Soldiers; Thank God for IEDs; Priests Rape Boys.

The petition falsely asserts at p. 4 that respondents had a sign saying Matt in Hell, and that this sign referred to the dead soldier, Lance Corporal Matthew Snyder. The record is clear what signs were used, this fact being driven home repeatedly at the trial court level. During the deposition of respondent Fred Phelps on April 16, 2007, he testified that "Matt in Hell" referred to Matthew Shepard, the man whose death is memorialized in a play called "The Laramie Project," which also features these respondents, and which respondents frequently picket. Everyone in the case is well aware what Matt in Hell is about, and that it was not present at the funeral in this case. A disturbing falsehood, though such a sign is not tortious or criminal. It does underscore that this case is designed to gain a rule of law that you cannot say someone is in hell in this nation, especially if that person died in a uniform; and is *not* about invasion of privacy or legally sufficient outrageous conduct. That petitioner's counsel is reduced to misstating this salient fact to this Court underscores the paucity of any merit to this petition.

When Matthew Snyder enlisted in the Marines in October, 2003, the United States had been at war in Iraq for seven months, and the whole world was talking about the war. At the same time, the nation was occupied with the question of homosexuals in the military; and with the issue of the ongoing sex-abuse scandal in the Catholic Church. Not to mention the ongoing debate in this nation in the churches, the legislative halls, the schools, and every other major institution or public forum, about the morals and conduct of America.

As the soldiers began to die, their funerals were turned into substantial public ordeals. The Court can take judicial notice of the fact that these soldiers' lives, deaths and funerals have received considerable public attention since they started, with lengthy news stories, lots of public discussion by family and friends, commentary in the media and often at the funeral by various public officials and figures, including elected leaders and clergy, and with lots of pomp and circumstance by the military. How these soldiers are living and dying is a topic of substantial public interest and dialogue, at least nationwide, probably worldwide. The prevailing view is that the soldiers are heroes, and that God is obligated to bless America. Those views clash with the Bible, in respondents' sincerely held religious opinion, and when these funerals are used to express those viewpoints, respondents feel duty bound to provide a countervailing message, to wit, if you want God's blessings, you have to obey him, and if you want the soldiers to stop dying, you have to stop sinning in this nation.

On March 3, 2006, Lance Corporal Snyder was killed in Iraq, when a Humvee he was in flipped after the driver lost control after he ignored orders from a superior to slow down. The media commenced covering the life and death of this young man, and petitioner, his father, participated in detailed interviews with the media. He also contacted Congressman John Murtha to inquire about his son's death and to express his disagreement with the war, which he reported to the media. In the course of talking with the media, petitioner revealed that he was divorced from the dead soldier's mother and other details about how he raised his son. Public reports also indicated the funeral would be held at a Catholic church, which the young marine attended as a child. Petitioner expected media to be present at the funeral because he had spoken with them in advance of the funeral. The media sought but did not receive permission to come onto the campus, but they were given a place to set up just off the grounds of the church, and were present before, during and after the funeral, filming and interviewing people besides respondents.

Meanwhile, given the very public nature of the soldiers' funerals, and the vast dialogue held in connection with their lives and deaths; and given the strong religious belief held by respondents that the soldiers were dying for the sins of America; in June 2005 respondents and other members of Westboro Baptist Church (WBC) began picketing in proximity to these funerals and memorial services. WBC's picketing has spanned nearly twenty years, starting in early 1991, and has addressed the morality of this nation and the consequences of proud institutionalized sin, including homosexuality (including same-sex marriage), fornication, adultery (including divorce and remarriage, called adultery by the Lord Jesus Christ), murder (especially of unborn babies), greed, and idolatry. Often the picketing has been directed to church goers in proximity to churches because respondents believe, in short, that the churches and those calling themselves Christian have lost all moral authority by their own sinful way of life, and now actively teach people to sin, instead of urging and warning them not to. After the fashion of the prophets and apostles, and Christ himself, respondents go into public arenas and warn their fellow man not to sin, and that the wrath of God will pour out on them if they do sin, and especially if they forget God's word, and make proud sin a way of life.

While this is an extraordinarily unpopular view today, in a nation that is largely disinterested in and unlearned about the Scriptures, it bears noting that when this country was formed, there were many preachers and church goers who believed these things, and the pulpits were full of preachers who warned people not to sin, after the fashion of Jonathan Edwards, whose sermon *Sinners in the Hands of an Angry God* is still found in the English textbooks in most high schools.

Respondents have, after nearly twenty years, learned that this message is not well received in this country; a fact which according to their religious beliefs makes it that much more imperative that the message be delivered. All of the evidence reflects that from the Scriptures respondents find a clear duty to warn a nation that is sinning away its final days of grace, that the nation will have the wrath of God poured out on its people for such proud and pervasive sin; and that this duty is, per such passages as Ezekiel 3 and 33, most pronounced when the sword is brought on a nation (per the expositors and the language, this at least includes when the nation is at war and its soldiers are dying). There is nothing pleasant about the straits this nation is in; but that only underscores – not lessens – the duty to speak. The funerals are where the eyes, ears, hearts and minds of the nation are focused; that is the audience – those who are still living and who can still repent and obey – to whom respondents deliver the message.

The manner in which the picketing is done is well-established. Respondents always stay a distance from the building or location of the event; always stay on public easements or right of ways; hold signs, sing songs (hymns and parodies) in natural voice (without amplification), and answer questions of passersby and the media. They contact law enforcement in advance as a courtesy and to prevent disturbances of the peace; and they obey all police directives. Respondents followed the same protocol here; stood where the police told them to stand; stayed 30 minutes; spoke with the media who approached them; and before the funeral began, stopped picketing and left.

The date, time and location of this funeral were published in several newspapers, including the large *Baltimore Sun* and on the Internet. The large Catholic Church where the funeral was held is part of an even larger complex, including more than one entrance, and including a school. The school is not a party to this action, and any thought petitioner may have about the impact on the students is legally irrelevant. The fact is that one of the priests at the church (who wrote and had published a letter to the editor about the funeral and critical of respondents' religious viewpoints within a few days after the funeral) made it his business to contact the school and have them close the blinds, and reroute the children out another door *as they came out to hold up picket signs outside the funeral.* This same priest arranged with law enforcement where the respondents would stand, and ensured all traffic was routed away from them during the funeral.

Besides the school children and their picket signs, a group called the Patriot Guard Riders (PGR) had a large presence, one group set up immediately outside the doorway into the church, and another group set up on the church property, closer to the intersection where respondents stood. The PGR routinely have numerous flags, insignia on their clothing and motorcycles, and at times their own signs. The PGR routinely picket in connection with the deaths of soldiers, often when respondents are not present, and when they are present, they counter the message of respondents with their own. (At the center of this debate is whether God is blessing or cursing America, and whether these soldiers are dying as heroes or not.) In this instance, the PGR contacted law enforcement, coordinated with them where they would stand, and made plans to attend before respondents announced any plans to picket in connection with this funeral. The PGR are often joined by local law enforcement, emergency responders, and military officials, who also stand outside and use official vehicles to engage in expressive activity (such as lining up the vehicles; gunning engines of motorcycles, cars and trucks, using large fire trucks to hoist giant-sized flags, etc.).

Petitioner and his daughters drove into the church, along with others attending the funeral, hundreds of feet away from respondents, up and over a hill. He did not see the respondents, and at most claims to have seen the tips of some signs. No one else testified to seeing the signs as they went into the funeral. The priest who conducted the funeral testified that there was no disruption to the funeral, and in fact he was not even aware picketing was occurring, and he centered the congregants so they fully focused on the funeral and the deceased soldier. Petitioner testified that the funeral went beautifully just as planned, and he stayed focused on his son during the funeral. The petition falsely states at pp. 3-4 that petitioner saw respondents and law enforcement, and watched his family and friends see respondents and law enforcement, all of which is specifically untrue. Because respondents were placed so far from any entrance to the church, including the main entrance used by funeral goers, none of them saw respondents. All they saw by all reports were the school children with signs and the PGR riders with flags and insignia.

During the funeral, all 1200 seats of the church were full; strangers attended and no one was blocked from the funeral. The service was described by witnesses at trial as a beautiful military ceremony full of pageantry with Marine pallbearers, and a moving tribute. Funeral goers walked through a tunnel of flags going in, and passed school children and PGR members lining the road on the way to the cemetery, as well as citizens, law enforcement, emergency responders and fire fighters, all honoring plaintiff's son. Members of the press had a designated spot off church grounds; petitioner did not see or hear them, and they did not approach the funeral procession. After the funeral, petitioner talked to the media about his son, his death, and his funeral. Petitioner received an outpouring of support, including hundreds of supportive e-mails, calls and cards, and other community support.

Not a single portion of the ceremony, funeral, procession or burial was in any slightest degree impacted or disrupted by respondents. Respondents did not go near the church, into the church, near petitioner, near any funeral goer, or do anything else but stand on a public easement over 1,000 feet from the funeral, out of sight and sound, and engage in peaceful non-disruptive expressive activity.

After the funeral, petitioner chose to watch and read news stories that depicted some of respondents' signs and quoted some of their words. A few weeks after the funeral one respondent, Shirley Phelps-Roper wrote a document about the funeral and picket, called an epic, and it was posted on WBC's passive Website. Petitioner searched the Internet for writings about his son, and on one occasion the search produced this document, which petitioner chose to read and show to others. Though the epic was asserted as a basis for the claims at trial, the petition before this Court appears to be addressing only claims based on the picketing.

Petitioner sued for defamation, invasion of privacy by publicity given to private life, intentional infliction of emotional distress, invasion of privacy through intrusion upon seclusion, and conspiracy to commit these four torts. Before trial, the trial court granted summary judgment on the defamation claims, because the respondents' speech was essentially religious opinion and would not realistically tend to expose petitioner to public hatred or scorn. The trial court also granted summary judgment on the invasion of privacy by publicity given to private life claim, because respondents had not made public any private information, and had published only information gleaned from a newspaper obituary and such publication would not be highly offensive to a reasonable person because the information was already a matter of public record.

The trial court allowed the claims of intentional infliction of emotional distress and invasion of privacy through intrusion upon seclusion to go to the jury. The jury was inflamed during the trial through strong rhetoric by petitioner and his counsel who demonstrated great hostility towards respondents' religious beliefs, often mocking their statements and religious views; and by the fact that almost no one believes the things respondents believe in this country anymore, so it is an easy thing to inflame people by questioning respondents and making them answer for what they believe, which is precisely what happened extensively during the trial.

Respondents repeatedly asked the trial court to clarify what words, specifically, including which signs and which portion of the epic, constituted the basis for the claims. The trial court opined during a pretrial conference that some signs, such as America is Doomed and God Hates America, expressed general points of view that may have merited First Amendment protection, but that others, such as Thank God for Dead Soldiers, Semper Fi Fags, You're Going to Hell and God Hates You, created a fact issue for the jury because they could be interpreted as being directed at the petitioner's family.

At trial, the court issued an instruction, No. 21, which allowed the jury to decide the relevant legal issues, telling the jury that certain speech, including that which is vulgar, offensive and shocking, is not entitled to absolute constitutional projection. Also that First Amendment protections vary with the nature and subject matter of the speech, and that when speech on matters of private concern is directed at private figures, the First Amendment must be balanced against the state's interest in protecting its citizens. Thus, the trial court left to the jury to assess the nature of the speech and whether it was protected, letting it decide whether it was directed at the petitioner's family and was so offensive and shocking as to not be entitled to protection. Thereby the trial court failed to perform its gatekeeper role as to protected speech, and let the jury decide legal issues reserved for the court.

The jury issued an award of $2.9 million in compensatory damages, and $8 million in punitive damages. When ruling on post trial motions, the trial court applied the standard of speech directed by private individuals against other individuals, and denied relief, beyond remitting the award to $5 million.

The Fourth Circuit found that the trial court wrongly permitted the jury to rule on legal issues reserved to the trial court, saying that at the least the judgment must be vacated for a new trial because of

Instruction No. 21. Also the court held that the trial court applied the wrong standard by treating the speech as private. The court conducted an independent examination of the whole record as is required in First Amendment cases, and concluded that the speech was on issues of public importance, including homosexuals in the military, the sex-abuse scandal within the Catholic Church, and the political and moral conduct of the United States and its citizens. The court also concluded that no reasonable reader could interpret the signs as asserting actual and objectively verifiable facts about petitioner or his son; and that even if the signs could reasonably be read to imply an assertion about petitioner or his son, the statements were protected because 1) they did not assert provable facts about an individual, and clearly contained imaginative and hyperbolic rhetoric intended to spark debate, and 2) a reasonable reader would not interpret the signs as including verifiable facts, as they contain loose, figurative or hyperbolic language that seriously negates any impression that the speaker is asserting actual facts about an individual.

The Fourth Circuit also found that the epic similarly consisted of religious opinion, by its context and tenor, and did not contain statements that would lead a reasonable reader to expect actual facts to be asserted therein.

A concurring opinion held that there was insufficient evidence to establish invasion of privacy by intrusion upon seclusion, because respondents did not intrude upon a private place; the protest occurred in a public place 1,000 feet from the funeral; respondents never confronted petitioner; petitioner did not see the protest; the evidence was undisputed that the church service was never disrupted; and, respondents never entered the church, and left before the funeral began. Further, that the epic was not an intrusion upon seclusion, because respondents did nothing to direct it to petitioner (such as email or transmit it to him); instead, petitioner learned of it during an Internet search and upon finding it chose to read it. The concurring opinion also found that there was insufficient evidence to establish intentional infliction of emotional distress because the protest was confined to a public area under supervision and regulation of local law enforcement and did not disrupt the church service; and that the epic which the trial court found was non-defamatory as a matter of law was not sufficient to support a finding of extreme and outrageous conduct.

REASONS FOR DENYING THE WRIT

This is a case involving speech on vital public issues, by a group that is probably fairly characterized as media (though the media/non-media distinction makes no difference here), that angered by its content a man who is probably a limited purpose public figure (which if not so, still does not remove the speech from the realm of public issue speech). The speech occurred in a traditionally public forum, far removed from any topic or place that could be deemed private by any analysis. The Fourth Circuit's decision does nothing but logically apply well-established legal principles under the First Amendment, concluding the obvious fact that the speech by respondents was on public issues, and was protected. No circuit has disagreed with this analysis under any circumstances.

The fact that there may be some issues about the laws of over forty states (and the federal government) about funeral picketing, which may at some time be presented to this Court in another case, on which the circuits may end up being split, does not make this case an appropriate one for review. Even if this Court were to agree to hear a case about a state or federal funeral picketing law, and were to a) find a privacy right in a funeral, b) regardless of the circumstances of the funeral, no matter how public an event it was, and c) expand the time, place and manner limits that can be imposed to protect such a privacy interest far beyond what it has ever done, none of those rulings would change the outcome in *this* case.

Review is not appropriate in *this* case because the issues are not novel, and the ruling by the Fourth Circuit is not in conflict with any other circuit, or with this Court's opinions. To the contrary, the Fourth Circuit's ruling is the only sound one given this Court's past rulings about public speech under the First Amendment.

I. THIS CASE DOES NOT INVOLVE PRIVATE MATTERS, AND THIS COURT HAS ALREADY ESTABLISHED THAT SPEECH ON PUBLIC MATTERS IS PROTECTED

Petitioner persists in treating this case as though it is a dispute between two private individuals about a private matter. The opposite is the case. Of greatest importance is the fact that the speech at issue was speech on public issues. That fact cannot be gainsaid, because the topics were the dying soldiers, homosexuality in the military, the sex-abuse scandal in the Catholic Church, and the morals of this nation. Given the magnitude and gravity of the problems facing this once-great nation, nothing could be more important at this hour than the question of how God is dealing with this nation, especially on the battlefield.

From this flawed vantage point, petitioner says the Fourth Circuit should not have extended the rule of law announced in *Hustler Magazine v. Falwell*, 485 U.S. 46, 108 S.Ct. 876, 99 L.Ed.2d 41 (1988), to disputes between private individuals. Yet this Court has recognized that there are constitutional limits on the type of speech to which state tort liability may attach, regardless of whether the plaintiff is a private or public figure. Thus, as the Fourth Circuit noted, this Court has held that the First Amendment protects statements on matters of public concern that fail to contain a provably false factual connotation. And, speech that is loose, figurative or hyperbolic language is protected to ensure that public debate will not suffer.

Even when finding that the New York Times actual malice standard was inappropriate for a private person attempting to prove he was defamed on matters of public interest, this Court said that constitutional protections were warranted; and that states could not impose liability without requiring a showing of fault, and could not permit recovery of presumed or punitive damages on less than a showing of the New York Times malice, see *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 15, 110 S.Ct. 2695, 2704, 111 L.Ed.2d 1 (1990).

Further, this Court noted in *Milkovich* that in *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 106 S.Ct. 1558, 89 L.Ed.2d 783 (1986), this Court held that the common law presumption that defamatory speech is false cannot stand when a plaintiff seeks damages against a media defendant for speech of public concern, *id*, 497 U.S. at 16, 110 S.Ct. at 2704. From there, in *Milkovich*, this Court went on to give protection to statements that cannot reasonably be interpreted as stating actual facts, to provide "assurance that public debate will not suffer for lack of 'imaginative expression' or the 'rhetorical hyperbole' which has traditionally added much to the discourse of our Nation,'" *id.*, 497 U.S. at 19, 110 S.Ct. at 2706.[1]

Even if the Court has not expressly said the *Falwell* case applies specifically to private figures if the speech is on public issues, that conclusion is obvious from other decisions by this Court. Indeed, within the *Falwell* case itself, the Court held that public figures may not recover for intentional infliction of emotional distress by reason of a publication, without showing that the publication contains a false statement of fact made with actual malice, *because* of the need to ensure the free flow of ideas and opinions on matters of public interest and concern, 485 U.S. at 50, 108 S.Ct. at 879.

The core reason this Court has put limits on the ability of states to attach tort liability to speech regarding public figures is because of the importance of debate about public issues. So it is certainly logical to extend that same reasoning to speech on public issues, and this Court has done so.

---

[1] As the Fourth Circuit noted, neither this Court nor the Fourth Circuit had addressed whether these constitutional protections apply to nonmedia defendants. After noting that the Second and Eighth Circuits have rejected any media/nonmedia distinction, the Fourth Circuit concluded: "Like those two circuits, we believe that the First Amendment protects nonmedia speech on matters of public concern that does not contain provably false factual assertions. Any effort to justify a media/nonmedia distinction rests on unstable ground, given the difficulty of defining with precision who belongs to the 'media.'" *Snyder v. Phelps*, 580 F.3d 206, 2009 U.S.App. LEXIS 21173 (4th Cir. 2009), at 29, footnote 13. Respondents are publishers; they have Websites; they have as much standing as any entity dubbed "media" to First Amendment protections.

Petitioner complains that giving First Amendment protection to speech about a private individual leaves the speaker able to subjectively dictate the definition of what is an issue of public concern or interest (pp. 8-9). To the contrary, this Court has articulated how to determine whether speech is of public or private interest, and the Fourth Circuit correctly recognized that this is a legal question for the court, not a jury question. (Otherwise, the great temptation to label speech private when you do not like the content would prevail – which is exactly what happened at the trial court level in this case.) Whether speech involves a matter of public concern is determined by examining the content, form and context of the speech, as revealed by the whole record. This was established in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 761, 105 S.Ct. 2939, 2946-2947, 86 L.Ed.2d 593 (1985). There is no way to examine the content, form and context of respondents' speech without quickly reaching the conclusion that it is public speech. In spite of herculean efforts by petitioner, his counsel, and the trial court, to wrench the plain meaning of the signs into applying personally to the private individualness of petitioner and his son, the facts simply do not support this strained conclusion.

The content of the speech is religious language about the wrath of God on this nation for its sin. The form of the speech is traditional public speech, to wit, picket signs on public right-of-ways; related expression such as media interviews, singing parodies, etc.; and the use of the Internet, the most public forum in existence. The context of the speech is a high profile public funeral, heavily covered by the media, heavily attended by the public at large, with two other groups picketing at the same time, and scores of people lining the roads to express themselves about this dead soldier, against a backdrop of a war that has the world's attention, being held at a church that is part of the Catholic Church, which has been the topic of intense public attention for his sex-abuse scandal, in a nation that claims to be the Christian leader of the world while establishing itself as a nation of extraordinarily proud and sinful people. What could possibly be more public interest than these issues?

(As discussed further below, in addition to the speech being on public issues, respondents contend that the funeral was public, not private, so any discussion about the speech being private because the funeral was private is inapposite here. Further, respondents submit there is a viable basis for concluding that petitioner is a limited purpose public figure. Petitioner's son voluntarily enlisted knowing the war in Iraq was of national importance and interest. Petitioner spoke with the media about his son, attempting to influence the public to believe his son was a hero. He spoke with the media and his Congressman attempting to influence views on the ongoing war. He invited the public at large to the funeral, and encouraged the participation of PGR, school children and citizens. He chose to have the funeral at a Catholic church, knowing the public's attention on the sex-abuse scandal. "[T]he New York Times standard is not limited to discussion of individuals who deliberately seek to involve themselves in public issues to influence their outcome. Our decisions in this area rest at bottom on the need to protect public discussion about matters of legitimate public concern," *Lorain Journal Co. v. Milkovich*, 474 U.S. 953, 963, 106 S.Ct. 322, 329, 88 L.Ed.2d 305 (1985), Brennan, J., and Marshall, J., dissenting from denial of certiorari.)

Emotive rhetoric about how mean respondents are changes nothing. Indeed, this Court said in *BE&K Construction Co. v. NLRB*, 536 U.S. 516, 517, 122 S.Ct. 2390, 2401, 153 L.Ed.2d 499 (2002), that in First Amendment contexts, "we have found it problematic to regulate some demonstrably false expression based on the presence of ill will," because "[d]ebate on public issues will not be uninhibited if the speaker must run the risk that it will be proved in court that he spoke out of hatred." In holding that the NLRB was not permitted to impose liability on an employer for filing a losing retaliatory lawsuit, this Court noted that it disallowed the use of an ill motive to create liability for speech in the realm of public debate about public figures in *Falwell*, *ibid*. So characterizing respondents' purpose, in spite of their testimony to the contrary, as hateful or mean or any such thing, is as legally meaningless as saying respondents have cooties. The topics on which respondents spoke, the form of the speech, and the context, all demonstrate that they were participating in national debate on critical public issues, in the exact same arena, on the exact same platform, in connection with the exact same deaths and funerals, as many other Americans, including petitioner, regardless of how dissenting their view may be.

As a matter of law the trial court found that the statements were not false. This Court has said that speech of public concern that is true as a matter of law is not speech that can be punished, simply by calling it intentional infliction of emotional distress. Petitioner cannot claim the speech here is false, because the trial court found it was not, and a private-figure plaintiff cannot recover without such a showing, per *Philadelphia Newspapers* and *Falwell*.

Also, as a matter of law, the Fourth Circuit was correct in finding that the language of respondents is not language which can be verified as true or false. As the Fourth Circuit noted, when a person talks of God and related topics, there is no possible way for any human to verify the truth or falsity of these views, which are based on faith. "The statement 'Thank God,' whether taken as an imperative phrase or an exclamatory expression, is similarly incapable of objective verification," and, "By employing God, the strong verb 'hate,' and graphic references to terrorist attacks, the Defendants use the sort of 'loose, figurative, or hyperbolic language' that seriously negates any impression that the speaker is asserting actual facts about an individual," *Phelps v. Snyder, supra,* 580 F.3d 206, 2009 U.S.App. LEXIS 21173 at 41. No one questions the right of those attending or speaking about the deaths and funerals of soldiers and others to say, "He's in heaven," or "God bless him," with or without any information to substantiate such a statement. Yet petitioner wishes to call into question the right of these respondents to say, "He's in hell," and "God has cursed him," as they read the published details of his body being blown to pieces by an IED, or otherwise being killed a young age like petitioner's son. Neither can be proven by objective facts; and both viewpoints should receive equal protection. The rule of law about hyperbolic and objectively unverifiable language being protected is well-established, and does not need to be revisited simply because the dissenting viewpoint is at issue here.

It is not necessary for this Court to review this case to establish the legal principle that speech on public issues is protected speech, and it was no mistake in this case to apply the Court's reasoning in *Falwell* and related cases to the facts of this case. An award for intentional infliction of emotional distress and invasion of privacy on these facts, even if there were in fact a basis for saying the conduct and words were outrageous, or even if in fact there were any type of an invasion, cannot stand under this Court's precedent, given the public nature of the speech and the type of language involved.

II. THIS CASE DOES NOT PRESENT THE QUESTION OF WHETHER FUNERAL GOERS ARE A CAPTIVE AUDIENCE OR HAVE THE RIGHT TO AVOID UNWANTED COMMUNICATION

Whether or not this Court would recognize a privacy interest in people going to a funeral, whether the family of the deceased or otherwise, may be a question this Court has to decide some day. But this is not the case where that has to be decided.

First, even if the Court found a privacy interest in a funeral comparable to that in a residence or abortion clinic, as this language by the Court in *Frisby v. Shultz,* 487 U.S. 474, 488, 108 S.Ct. 2495,2504, 101 L.Ed.2d 420 (1988) suggests, if you use the home for a union meeting, that union meeting is not private:

> Of course, this case presents only a facial challenge to the ordinance. Particular hypothetical applications of the ordinance-to, for example, a particular resident's use of his or her home as a place of business or public meeting, or to picketers present at a particular home by invitation of the resident-may present somewhat different questions. Initially, the ordinance by its own terms may not apply in such circumstances, since the ordinance's goal is the protection of residential privacy ... and since it speaks only of a "residence or dwelling," not a place of business .... Cf. *Carey, supra,* 447 U.S., at 457, 100 S.Ct., at 2288

> (quoting an antipicketing ordinance expressly rendered inapplicable by use of home as a place of business or to hold a public meeting).

Similarly, if you use a church for a public free-for-all, inviting the community at large, the media, and school-children picketers and veteran biker picketers, and have your priest write a letter to the editor about the funeral immediately thereafter, you cannot claim privacy in that event. So even if respondents were not speaking on issues of public concern as addressed in Section I above, this funeral was not a private event. The fact is, no one considered the event private, and no one considers the soldiers' funerals in general private. Politicians, clergy, citizens, the military and the media, all see them as public platforms for public commentary. It is only when the unpopular message respondents publish joins the fray that talk of privacy ensues.

Second, even if the speech was not on public issues, and the funeral was private, *these* funeral goers did not receive *any* communication from respondents. Petitioner watching something on television later, or seeing it in a newspaper the next day, is not communication to a captive audience by these respondents. This would be a wholly inappropriate case to address the issue of whether funeral goers are a captive audience who should be shielded from unwanted communication. There is not a single piece of evidence in this record showing that a single person going into the funeral at issue in this case saw, heard, or was aware of respondents' presence, let alone that they received unwanted communication from them as they went in to the funeral.

Even if these funeral goers were entitled to be free from unwanted communication, that cannot, as a matter of constitutional law, mean any time, any place, just because they do not like the words. This Court has spoken rarely of being free from unwanted communication, and then only in the narrow context of a specifically-defined privacy interest, such as being able to avoid being physically confronted within eight feet of approach within a 100-foot zone as a person is going into an abortion clinic about to undergo a medical procedure, *Hill v. Colorado*, 530 U.S. 703, 120 S.Ct. 2480, 147 L.Ed.2d 597 (2000), or in the privacy of the home, *Rowan* v. *Post Office Dept.*, 397 U.S. 728, 738, 90 S.Ct. 1484, 25 L. Ed. 2d 736 (1970), and its immediate surroundings, *Frisby* v. *Schultz, supra*, 487 U.S. at 485. Whatever the scope may be of privacy rights, or the right to avoid unwanted communication, within the context of a funeral of any kind, such a right is not implicated in any degree under the facts of this case.

III. THERE IS NO SPLIT IN THE CIRCUITS RELEVANT TO THIS CASE, BECAUSE THIS CASE IS NOT ABOUT WHETHER LAWS LIMITING THE TIME, PLACE AND MANNER OF FUNERAL PICKETS ARE CONSTITUTIONAL

There may be a split in the circuits brewing about how far a law can go in putting limits on peaceful non-disruptive picketing in proximity to a funeral, memorial service, or funeral procession. See ***Phelps-Roper v. Strickland***, 539 F.3d 356 (6th Cir. 2008) and *Phelps-Roper v. Nixon*, 545 F.3d 685 (8th Cir. 2008), cert. denied, *Nixon v. Phelps-Roper*, 129 S.Ct. 2865, 174 L.Ed.2d 578, 2009 U.S. LEXIS 4769 (U.S., 2009).

However, whatever the Circuit Courts end up holding about the various laws that are under review, as to the distance, time periods, floating buffers, and nature of expressive activity prohibited or limited, none of those rulings, or any review by this Court of those rulings, pertain to the issues in this case. This Court has never approved of an imposed distance of over 1,000 feet based on any privacy interest. Further, it is unlikely that the Court would uphold laws that on their face or as applied result in the picketers being put completely out of sight and sound of their target audience. It may be worth noting in passing, that if Osama bin Laden was killed, and his funeral date, time and location published, it is doubtful anyone would question the right of the families of the 911 victims to protest in proximity to his funeral. Nor would it be fitting to deny the same right to those who supported his views and activities. As long as both groups engaged in non-disruptive peaceful picketing, that funeral would be an appropriate forum for expressive activity.

The day may come when this Court has occasion to review the parameters of privacy interests in funerals, and to address the implications of the very public nature of the funerals being held in connection with soldiers' funerals in this country. But that day is not now, and that review is not relevant to this case. As the Fourth Circuit twice said in its opinion, "The district court properly distinguished these proceedings, where the Defendants contend that the First Amendment immunizes them from tort liability, from other decisions ... addressing the constitutionality of statutory prohibitions affecting funeral picketing," *Phelps v. Snyder, supra,* 580 F.3d 206, 2009 U.S.App. LEXIS 21173 at 23-24, footnote 10; and, after holding that liability could not attach to respondents' words in this case without violating the constitution, "[n]onetheless, the various states and localities, as well as grieving families, may yet protect the sanctity of solemn occasions such as funerals and memorials. Indeed, governmental bodies are entitled to place reasonable and content-neutral time, place, and manner restrictions on activities that are otherwise constitutionally protected," *id*. at 49.

Review of this case would be inappropriate on the basis of a suggestion that there is a split in the circuits over the issues raised by this action.

CONCLUSION

This case is not appropriate for review, because it presents no novel or new issues for this Court, and does not pertain to a division among the Circuit Courts or between the Fourth Circuit and this Court. Rather, the Fourth Circuit relied upon well-settled legal principles from this Court's opinions in setting aside a runaway verdict which was based solely on words found to be true as a matter of law, on speech of vital and substantial public interest issues, uttered in a traditional public forum, well removed from the funeral, outside of sight or sound of the funeral-goers, and only tested by litigation because of petitioner's visceral disagreement with content. The jury should have never been given this case, and the oversized verdict for true words demonstrates that fact. The Fourth Circuit carefully reviewed the full record, and found that from the content, form and context, the words were public interest words, and properly protected them from tort liability, imposed simply because they were considered unpleasant. No privacy interests are implicated by the facts of this case, and this is not an appropriate venue to address what measure of privacy interest may exist in highly publicized soldiers' funerals, used often by many as public platforms. Petitioner seeks a rule of law that would punish into silence respondents' message because he disagrees with it so strongly; that is not a good reason for this Court to review this case, because such an outcome would require completely uprooting long and well-established constitutional law.

Respectfully submitted,

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JOINT
APPENDIX

Supreme Court, U.S.
FILED
MAY 24 2010
OFFICE OF THE CLERK

No. 09-751

IN THE

Supreme Court of the United States

ALBERT SNYDER,

Petitioner,

v.

FRED W. PHELPS, SR., *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED DECEMBER 23, 2009
CERTIORARI GRANTED MARCH 8, 2010

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Opinion Of The United States Court Of Appeals For The Fourth Circuit Filed September 24, 2009 .... 1a

Memorandum Opinion Of The United States District Court For The District Of Maryland Filed February 4, 2008 .... 58a

APPENDIX A — RELEVANT DOCKET ENTRIES OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

General Docket
United States Court of Appeals for the Fourth Circuit

Docketed: 01/09/2008
Termed: 09/24/2009

Court of Appeals Docket #: 08-1026
Nature of Suit: 4360 Other Personal Injury
Albert Snyder v. Fred Phelps, Sr.
Appeal From: United States District Court for the District of Maryland at Baltimore
Fee Status: fee paid

Case Type Information:

1) Civil Private
2) private
3) null

Originating Court Information:

District: 0416-1 : *1:06-cv-01389-RDB*
Court Reporter: Lisa K. Bankins, Official Court Reporter
Court Reporter: Stephanie Savoy, Court Reporter Coordinator
Presiding Judge: Richard D. Bennett, U. S. District Court Judge
Date Filed: 06/05/2006

Date Order/Judgment:
11/05/2007
10/31/2007
04/07/2008

Date Order/Judgment EOD:
11/05/2007
11/01/2007
04/07/2008

Date NOA Filed:
11/30/2007
04/24/2008

Prior Cases:

06-2333
Date Filed: 12/28/2006
Date Disposed: 02/06/2007
Disposition: R42b

07-6968
Date Filed: 06/29/2007
Date Disposed: 12/04/2007
Disposition: opn.u

Current Cases:
None

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ALBERT SNYDER,

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FRED W. PHELPS, Sr.; WESTBORO BAPTIST CHURCH, INCORPORATED; REBEKAH A. PHELPS-DAVIS; SHIRLEY L. PHELPS-ROPER,

Defendants - Appellants

and

JANE DOE; JOHN DOE, Jr.,

Defendants

THOMAS JEFFERSON CENTER FOR THE PROTECTION OF FREE EXPRESSION; AMERICAN CIVIL LIBERTIES UNION; AMERICAN CIVIL LIBERTIES UNION OF MARYLAND,

Amici Supporting Appellant

JEFFREY IRA SHULMAN,

Amicus Supporting Appellee

06/16/2008	33	OPENING BRIEF (PAPER) file-stamped, on behalf of Fred W. Phelps, Sr., Rebekah A. Phelps-Davis, Shirley L. Phelps-Roper and Westboro Baptist Church, Incorporated. Number of pages: [39]. Entered on Docket Date: 06/18/2008. [997878620] [08-1026] (SAC)
06/16/2008	35	APPENDIX (PAPER) file-stamped, on behalf of Fred W. Phelps, Sr., Rebekah A. Phelps-Davis, Shirley L. Phelps-Roper and Westboro Baptist Church, Incorporated. Total number of volumes (including any sealed): 15 [3 DVD's are included - post-trial motion

		attachment a; Defendant's Exhibits no. 41a and 19]. Total number of pages in all volumes: 4086. Entered on Docket Date: 06/19/2008. [997878977] [08-1026] (SAC)

* * *

08/11/2008 40 pg, 140.01 KB	*60*	Corrected BRIEF filed by Appellee Albert Snyder in electronic and paper format. Type of Brief: Response. Method of Filing Paper Copies: mail. Date Paper Copies Mailed, Dispatched, or Delivered to Court: 08/11/2008. [997913198] [08-1026] (SES)

* * *

08/11/2008	63	SUPPLEMENTAL APPENDIX (PAPER) file-stamped on behalf of Albert Snyder. Sealed volume: N. Total number of volumes (including any sealed): 1. Total number of pages in all volumes: 227. Entered on Docket Date: 08/14/2008. [997915626] [08-1026] (BB)

08/24/2008 *64*
35 pg, 180.77 KB

BRIEF filed by Appellants Fred W. Phelps, Sr., Rebekah A. Phelps-Davis, Shirley L. Phelps-Roper and Westboro Baptist Church, Incorporated in electronic and paper format. Type of Brief: Reply. Method of Filing Paper Copies: mail. Date Paper Copies Mailed, Dispatched, or Delivered to Court: 08/25/2008. [997921846] [08-1026] (MJP)

* * *

09/24/2009 *82*
44 pg, 184.24 KB

PUBLISHED AUTHORED OPINION filed. Originating case number: 1:06-cv-01389-RDB Copies to all parties and the district court/agency. [998188909] [08-1026] (BB)

* * *

03/12/2010 *92*
1 pg, 15.21 KB

SUPREME COURT REMARK—petition for writ of certiorari granted. 03/08/2010 [08-1026] (DHB)

* * * *

APPENDIX B — RELEVANT DOCKET ENTRIES OF THE UNITED STATES DISTRICT COURT, DISTRICT OF MARYLAND, BALTIMORE

U.S. District Court
District of Maryland (Baltimore)
CIVIL DOCKET FOR CASE #: 1:06-cv-01389-RDB

Snyder v. Phelps et al
Assigned to: Judge Richard D Bennett
Demand: $75,000
Case in other court: Fourth Circuit Court of Appeals, 06-02333
Fourth Circuit Court of Appeals, 07-06968
Fourth Circuit Court of Appeals, 08-01026
Cause: 28:1332 Diversity-Personal Injury

Date Filed: 06/05/2006
Date Terminated: 09/11/2008
Jury Demand: Both
Nature of Suit: 360 P.I.: Other
Jurisdiction: Diversity

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Date Filed	**#**	**Docket Text**
06/05/2006	*1*	COMPLAINT against Fred W. Phelps, Sr, John Does, Jane Does, Westboro Baptist Church, Inc. (Filing fee $ 350 paid receipt number 84637005641), filed by Albert Snyder. (Attachments: # *1* Civil Cover Sheet) (aap, Deputy Clerk) (Entered: 06/06/2006)

* * *

Date Filed	**#**	**Docket Text**
10/30/2006	*27*	MEMORANDUM OPINION. Signed by Judge Richard D Bennett on 10/30/06. (eg, Deputy Clerk) (Entered: 10/30/2006)

* * *

Date Filed	**#**	**Docket Text**
02/23/2007	*64*	AMENDED COMPLAINT against Shirley L. Phelps-Roper, Rebekah A. Phelps-Davis, Fred W. Phelps, Sr, Westboro Baptist Church, Inc., filed by Albert Snyder. (Attachments: # *1* Redline Version) (jnl, Deputy Clerk) (Entered: 02/26/2007)

* * *

03/19/2007	*68*	ANSWER to Amended Complaint by Fred W. Phelps, Sr, Westboro Baptist Church, Inc..(Katz, Jonathan) (Entered: 03/19/2007)

* * *

04/24/2007	*76*	MOTION to Dismiss, for Summary Judgment by Shirley L. Phelps-Roper, Rebekah A. Phelps-Davis. and (Attachments 1 through 16 Filed Separately) (Attachments: # *1* Memorandum# *2* Affidavits & Attachments# *3* Affidavit of Rebekah A. Phelps-Davis# *4* Affidavit of Shirley L. Phelps-Roper) (eg, Deputy Clerk) (Entered: 04/24/2007)
05/10/2007	*77*	RESPONSE in Opposition re *76* MOTION to Dismiss MOTION for Summary Judgment filed by Albert Snyder.Replies due by 5/24/2007. (Attachments: # *1* Affidavit) (Summers, Sean) (Entered: 05/10/2007)

* * *

05/23/2007	*80*	REPLY to Response to Motion re *76* MOTION to Dismiss, MOTION for Summary Judgment filed by Shirley L. Phelps-Roper, Rebekah A. Phelps-Davis. (Attachments: # *1* Exhibit 17# *2* Exhibit 18# *3* Exhibit 19# *4* Exhibit 20# *5* Exhibit 21) (hml, Deputy Clerk) (Entered: 05/23/2007)

* * *

06/05/2007	*84*	MEMORANDUM OPINION. Signed by Judge Richard D Bennett on 6/4/07. (c/m) (eg, Deputy Clerk) Modified on 6/5/2007 (eg, Deputy Clerk). (Entered: 06/05/2007)

* * *

06/19/2007	*93*	ANSWER to Amended Complaint by Shirley L. Phelps-Roper, Rebekah A. Phelps-Davis. (THE ATTACHMENT HAS BEEN REMOVED DUE TO ERROR) (hml, Deputy Clerk) Modified on 6/19/2007 (hml, Deputy Clerk). (Entered: 06/19/2007)

* * *

09/04/2007 *125* SEALED - RENEWED MOTION for Summary Judgment & Incorporation of prior/other Summary judgment Motions & Preservation of Issue,and MOTION to Clarify Supplement to Motion for Summary Judgment by Shirley L. Phelps-Roper, Rebekah A. Phelps-Davis. (file separately) Responses due by 9/21/2007 Responses due by 9/21/2007 (slf, Deputy Clerk) (Entered: 09/04/2007)

* * *

09/20/2007 *140* ORDER denying *107* Motion of defendants Westboro Baptist Church and Fred W. Phelps Sr., for Reconsideration; granting in part and denying in part *108* Motion for Reconsideration of defendants Shirley Phelps-Roper and Rebekah Phelps-Davis. Signed by Judge Richard D Bennett on 9/20/07. (c/m 9/20/07) (slf, Deputy Clerk) (Entered: 09/20/2007)

* * *

09/21/2007	*143*	RESPONSE in Opposition re *76* MOTION to Dismiss MOTION for Summary Judgment, *125* MOTION for Summary Judgment filed by Albert Snyder.Replies due by 10/5/2007. (Summers, Sean) (Entered: 09/21/2007)
09/21/2007	*144*	RESPONSE in Opposition re *76* MOTION to Dismiss MOTION for Summary Judgment, *125* MOTION for Summary Judgment *Plaintiff's Response in Opposition to Phelps-Davis and Phelps-Roper's Statement of Facts* filed by Albert Snyder.Replies due by 10/5/2007. (Summers, Sean) (Entered: 09/21/2007)

* * *

10/03/2007	150	REPLY by Shirley L. Phelps-Roper, Rebekah A. Phelps-Davis to Plaintiff's Response to their Motion *125* MOTION for Summary Judgment; attachments and CD of St. Johns Catholic Church Walk Around July 13, 2007 (FILED SEPARATELY) (c/s) (cag, Deputy Clerk) (Entered: 10/04/2007)

* * *

10/04/2007	*153*	NOTICE by Albert Snyder *of Filing Under Seal Motion in Limine to Preclude any Evidence or Testimony Concerning Sexual Issues* (Summers, Sean) (SEALED DOCUMENT REC'D 10/9/07) (Entered: 10/04/2007)

* * *

10/05/2007	*157*	MOTION in Limine *to Preclude a "First Amendment Defense"* by Albert Snyder. Responses due by 10/22/2007 (Attachments: # *1* Text of Proposed Order) (Summers, Sean) (Entered: 10/05/2007)

* * *

10/11/2007	*166*	MOTION in Limine *to Exclude any Evidence Concerning Plaintiff's "Court File" in his Divorce Action* by Albert Snyder. Responses due by 10/29/2007 (Attachments: # *1* Text of Proposed Order) (Summers, Sean) (Entered: 10/11/2007)

* * *

10/15/2007	*168*	RESPONSE to *149* MOTION in Limine *to Exclude a Portion of Professor Balmer's Expert Report, 157* MOTION in Limine *to Preclude a "First Amendment Defense"* filed by Shirley L. Phelps-Roper, Rebekah A. Phelps-Davis.Replies due by 10/29/2007 (c/s) (cags, Deputy Clerk) Additional attachment(s) added on 10/15/2007 (cags, Deputy Clerk). (Entered: 10/15/2007)
10/15/2007	*169*	RESPONSE to *151* Motion in Limine to Preclude any Evidence or Testimony Concerning Sexual Issues filed by Shirley L. Phelps-Roper, Rebekah A. Phelps-Davis.Replies due by 10/29/2007. (c/s) (cag, Deputy Clerk) (Entered: 10/15/2007)
10/15/2007	*172*	ADDITIONAL AUTHORITIES in support of *125* MOTION for Summary Judgment filed by Shirley L. Phelps-Roper, Rebekah A. Phelps-Davis. (c/s) (cag, Deputy Clerk) (Entered: 10/16/2007)

* * *

10/16/2007	*173*	ORDER granting in part and denying in part *125* Motion of Defendants for Summary Judgment; granting in part and denying in part *126* Motion of Defendants for Summary Judgment; granting *149* Motion of Plaintiff to Exclude a Portion of Professor Balmer's Expert Report; granting *156* Motion of Plaintiff to Preclude Experts Who Have not Produced an Expert Report; denying *157* Motion of Plaintiff to Preclude a "First Amendment Defense"; declaring as moot *160* Motion of Plaintiff to Prevent Westboro Baptist Church, Inc., from Changing its Corporate Designee; denying *161* Motion of Plaintiff to Exclude References to Life Insurance and Benefits Received from the Military; granting *163* Motion of Plaintiff to Limit the Number of Fact Witnesses the Defendants are Able to Present; granting in part and denying in part *164* Defendants Motion in Limine; denying *166* Motion of Plaintiff to Exclude any Evidence Concerning Plaintiff's "Court File". Signed by Judge Richard D Bennett on 10/16/07. (mcb, Deputy Clerk) (Entered: 10/17/2007)

* * *

10/18/2007	*180*	MOTION to Change Venue by Fred W. Phelps, Sr, Westboro Baptist Church, Inc.. Responses due by 11/5/2007 (Attachments: # *1* Exhibit # *2*) (Katz, Jonathan) (Entered: 10/18/2007)
10/19/2007	*181*	ORDER GRANTING re *153* Motion of Plaintiff in Limine to Preclude Any Evidence or Testimony Concerning Sexual Issues filed by Albert Snyder. Signed by Judge Richard D Bennett on 10/19/07. (c/m 10/19/07) (slf, Deputy Clerk) (Entered: 10/19/2007)
10/19/2007	*182*	MOTION to clarify and renewed motion for summary judgment by Shirley L. Phelps-Roper, Rebekah A. Phelps-Davis. Responses due by 11/5/2007 Responses due by 11/5/2007 (slf, Deputy Clerk) (Entered: 10/19/2007)

10/19/2007	*183*	ORDER denying *182* Motion of defendants to clarify and ; denying *182* renewed Motion for Summary Judgment. Signed by Judge Richard D Bennett on 10/19/07. (C/M 10/19/07) (slf, Deputy Clerk) (Entered: 10/19/2007)

* * *

10/19/2007	*185*	ORDER denying *180* Motion of defendants to Change Venue. Signed by Judge Richard D Bennett on 10/19/07. (c/m 10/19/07) (slf, Deputy Clerk) (Entered: 10/19/2007)

* * *

10/22/2007		Voir Dire held on 10/22/2007 held before Judge Richard D Bennett. (Court Reporter L. Bankins.) (pat, Deputy Clerk) (Entered: 10/24/2007)

* * *

10/25/2007		Oral Motion by Defendant for Judgment as a Matter of Law (FRCP50)made at the close of the Plaintiff's case "DENIED" for reasons stated in open court held before Judge Richard D Bennett. (Court Reporter L. Bankins.) (pat, Deputy Clerk) (Entered: 10/25/2007)

* * *

10/29/2007	*193*	MOTION *for Appropriate Relief* by Fred W. Phelps, Sr, Westboro Baptist Church, Inc. Responses due by 11/15/2007 (Attachments: # *1*)(Katz, Jonathan) (Entered: 10/29/2007)
10/29/2007	*194*	MOTION for Mistrial by Shirley L. Phelps-Roper, Rebekah A. Phelps-Davis. Responses due by 11/15/2007 (Attachments: # *1* Attachment) (eg, Deputy Clerk) (Entered: 10/29/2007)

* * *

10/29/2007	Oral Motion by Defendants for Judgment as a Matter of Law renewed at the conclusion of all the evidence "DENIED" for reasons stated in open court before Judge Richard D Bennett. (Court Reporter L. Bankins.) (pat, Deputy Clerk) (Entered: 11/01/2007)

* * *

10/31/2007	VERDICT: in favor of the Plaintiff against the Defendants in the amount of 2,900,000.00 (two million nine hundred thousand dollars) in compensatory damages and $8,000,000.00 (eight million dollars)in punitive damages for a total of $10,900,000.00(ten million nine hundred thousand dollars) (pat, Deputy Clerk) (Entered: 11/01/2007)
10/31/2007	Oral Motion by Defendants for Mis-Trial "DENIED" for reasons stated in open court before Judge Richard D Bennett. (Court Reporter L. Bankins.) (pat, Deputy Clerk) (Entered: 11/01/2007)

* * *

11/02/2007	204	Jury Notes. (FILED SEPARATELY) (eg, Deputy Clerk) Modified on 11/2/2007 (eg, Deputy Clerk). (Entered: 11/02/2007)

* * *

11/08/2007	*211*	POST-TRIAL MOTIONS, MOTION for Judgment; MOTION for Reconsideration and Hearing; MOTION to Alter or Amend Judgment; MOTION for New Trial, MOTION for Relief from Judgment and/or MOTION for any Other Relief in Law and Equity Warranted Under the Facts and Law and (CD as Attachment A) by Shirley L. Phelps-Roper, Rebekah A. Phelps-Davis, pro se. (CD Filed Separately)(c/s) (Attachments: *# 1* Brief) (eg, Deputy Clerk) (Entered: 11/08/2007)
11/08/2007	*212*	POST-TRIAL MOTION to Stay by Shirley L. Phelps-Roper, Rebekah A. Phelps-Davis, pro se. (c/s) (eg, Deputy Clerk) (Entered: 11/09/2007)

* * *

11/14/2007	*215*	MOTION for Judgment as a Matter of Law *and for Additional Relief* by Fred W. Phelps, Sr, Westboro Baptist Church, Inc.. Responses due by 12/3/2007 (Katz, Jonathan) (Entered: 11/14/2007)

* * *

11/26/2007	*220*	RESPONSE in Opposition re *211* MOTION for Judgment MOTION for Reconsideration MOTION to Alter/Amend Judgment MOTION for New Trial filed by Albert Snyder.Replies due by 12/10/2007. (Summers, Sean) (Entered: 11/26/2007)

* * *

11/30/2007	*222*	NOTICE OF APPEAL by Shirley L. Phelps-Roper, Rebekah A. Phelps-Davis, Fred W. Phelps, Sr, Westboro Baptist Church, Inc.. Appeal Record due by 12/31/2007. (Katz, Jonathan) (Entered: 11/30/2007)

* * *

12/03/2007	*225*	RESPONSE in Opposition re *215* MOTION for Judgment as a Matter of Law *and for Additional Relief* filed by Albert Snyder. Replies due by 12/17/2007. (Summers, Sean) (Entered: 12/03/2007)

* * *

12/06/2007	*229*	REPLY of Defendants to Plaintiff's Response to Post-Trial Motions filed by Shirley L. Phelps-Roper, Rebekah A. Phelps-Davis. (c/s) (eg, Deputy Clerk) (Entered: 12/06/2007)

* * *

12/10/2007	*232*	Supplemental to *230* Reply of Defendants to Plaintiff's Response to Post-Trial Motion for Stay filed by Shirley L. Phelps-Roper, Rebekah A. Phelps-Davis. (Attachments: # *1* Attachment# *2* Attachment 2)(c/s) (eg, Deputy Clerk) (Entered: 12/10/2007)

12/10/2007	*233*	RESPONSE re *232* Supplemental *Reply of Defendants Phelps-Davis and Phelps-Roper to Plaintiff's Response to Motion for Stay* filed by Albert Snyder. (Summers, Sean) (Entered: 12/10/2007)

* * *

12/18/2007	*235*	REPLY to Response to Motion re *214* MOTION to Stay re *212* MOTION to Stay filed by Fred W. Phelps, Sr, Westboro Baptist Church, Inc. (Attachments: # *1* Phelps-Roper Opinion) (Katz, Jonathan) (Entered: 12/18/2007)
12/18/2007	*236*	REPLY to Response to Motion re *215* MOTION for Judgment as a Matter of Law *and for Additional Relief* filed by Fred W. Phelps, Sr, Westboro Baptist Church, Inc. (Katz, Jonathan) (Entered: 12/18/2007)

* * *

01/30/2008	*240*	Supplement in Support of Post-Trial Motions and Attachments. (c/s to chambers w/CD) (Attachments: # *1* attachments) (eg, Deputy Clerk) (Entered: 01/30/2008)

02/04/2008	*241*	RESPONSE re *240* Supplemental *Post-Trial Document of Defendants Phelps-Davis and Phelps-Roper* filed by Albert Snyder. (Attachments: # *1* Exhibit A, # *2* Exhibit B) (Summers, Sean) (Entered: 02/04/2008)
02/04/2008	*242*	MEMORANDUM OPINION. Signed by Judge Richard D Bennett on 2/4/08. (eg, Deputy Clerk) (Entered: 02/04/2008)

* * *

02/20/2008	*246*	MOTION for Reconsideration re *243* Order on Motion for Judgment, Order on Motion for Reconsideration, Order on Motion to Alter/Amend Judgment, Order on Motion for New Trial, Order on Motion for Miscellaneous Relief, Order on Motion for Judgment as a Matter of Law by Shirley L. Phelps-Roper, Rebekah A. Phelps-Davis, Fred W. Phelps, Sr, Westboro Baptist Church, Inc. Responses due by 3/10/2008 (Attachments: # *1* Motion signature page., # *2*

		Memorandum of Points and Authorities, # *3* Points and Authorities signature page) (Katz, Jonathan) (Entered: 02/20/2008)

* * *

02/21/2008	*248*	MEMORANDUM ORDER denying *246* Motion for Reconsideration. Signed by Judge Richard D Bennett on 2/21/08. (c/m to pro se defendants) (eg, Deputy Clerk) (Entered: 02/21/2008)

* * *

02/21/2008	*251*	TRANSCRIPT filed for dates of 10/25/07 before Judge Bennett, re *222* Notice of Appeal Court Reporter: Lisa Bankins. (Filed Separately) (sls, Deputy Clerk) (Entered: 02/21/2008)
02/21/2008	*252*	TRANSCRIPT filed for dates of 10/24/07 before Judge Bennett, re *222* Notice of Appeal Court Reporter: Lisa Bankins. (Filed Separately) (sls, Deputy Clerk) (Entered: 02/21/2008)

02/21/2008	*253*	TRANSCRIPT filed for dates of 10/31/07 before Judge Bennett, re *222* Notice of Appeal Court Reporter: Lisa Bankins. (Filed Separately) (sls, Deputy Clerk) (Entered: 02/21/2008)
02/21/2008	*254*	TRANSCRIPT filed for dates of 10/22/07 before Judge Bennett, re *222* Notice of Appeal Court Reporter: Lisa Bankins. (Filed Separately) (sls, Deputy Clerk) (Entered: 02/21/2008)
02/21/2008	*255*	TRANSCRIPT filed for dates of 10/23/07 before Judge Bennett, re *222* Notice of Appeal Court Reporter: Lisa Bankins. (Filed Separately) (sls, Deputy Clerk) (Entered: 02/21/2008)
02/21/2008	*256*	TRANSCRIPT filed for dates of 10/26/07 before Judge Bennett, re *222* Notice of Appeal Court Reporter: Lisa Bankins.(Filed Separately) (sls, Deputy Clerk) (Entered: 02/21/2008)

02/21/2008	*257*	TRANSCRIPT filed for dates of 10/29/07 before Judge Bennett, re *222* Notice of Appeal Court Reporter: Lisa Bankins.(Filed Separately) (sls, Deputy Clerk) (Entered: 02/21/2008)
02/21/2008	*258*	TRANSCRIPT filed for dates of 10/30/07 before Judge Bennett, re *222* Notice of Appeal Court Reporter: Lisa Bankins.(Filed Separately) (sls, Deputy Clerk) (Entered: 02/21/2008)

* * *

02/26/2008	*261*	TRANSCRIPT filed for dates of 10/15/07 before Judge Bennett, re *222* Notice of Appeal Court Reporter: Lisa Bankins. (Filed Separately) (sls, Deputy Clerk) (Entered: 02/26/2008)

* * *

09/25/2009	*283*	JUDGMENT of USCA (certified copy)" REVERSING" the judgment of the District Court and "DISCHARGING" the bonds as to *222* Notice of Appeal filed by Rebekah A. Phelps-Davis, Westboro Baptist Church, Inc., Shirley L. Phelps-Roper, Fred W. Phelps, Sr. (sls, Deputy Clerk) (Entered: 09/25/2009)

SUPPLEMENTAL APPENDIX

Supreme Court, U.S.
FILED

MAY 2 4 2010

OFFICE OF THE CLERK

B159

No. 09-751

IN THE
Supreme Court of the United States

ALBERT SNYDER,

Petitioner,

v.

FRED W. PHELPS, SR., *et al.*,

Respondents.

**ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

SUPPLEMENTAL JOINT APPENDIX

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Attorneys for Petitioner

* *Counsel of Record*

**PETITION FOR CERTIORARI FILED DECEMBER 23, 2009
CERTIORARI GRANTED MARCH 8, 2010**

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Photograph, Students and Patriot Guard, March 10, 2006 Defendants' Trial Exhibit 42b SA-9

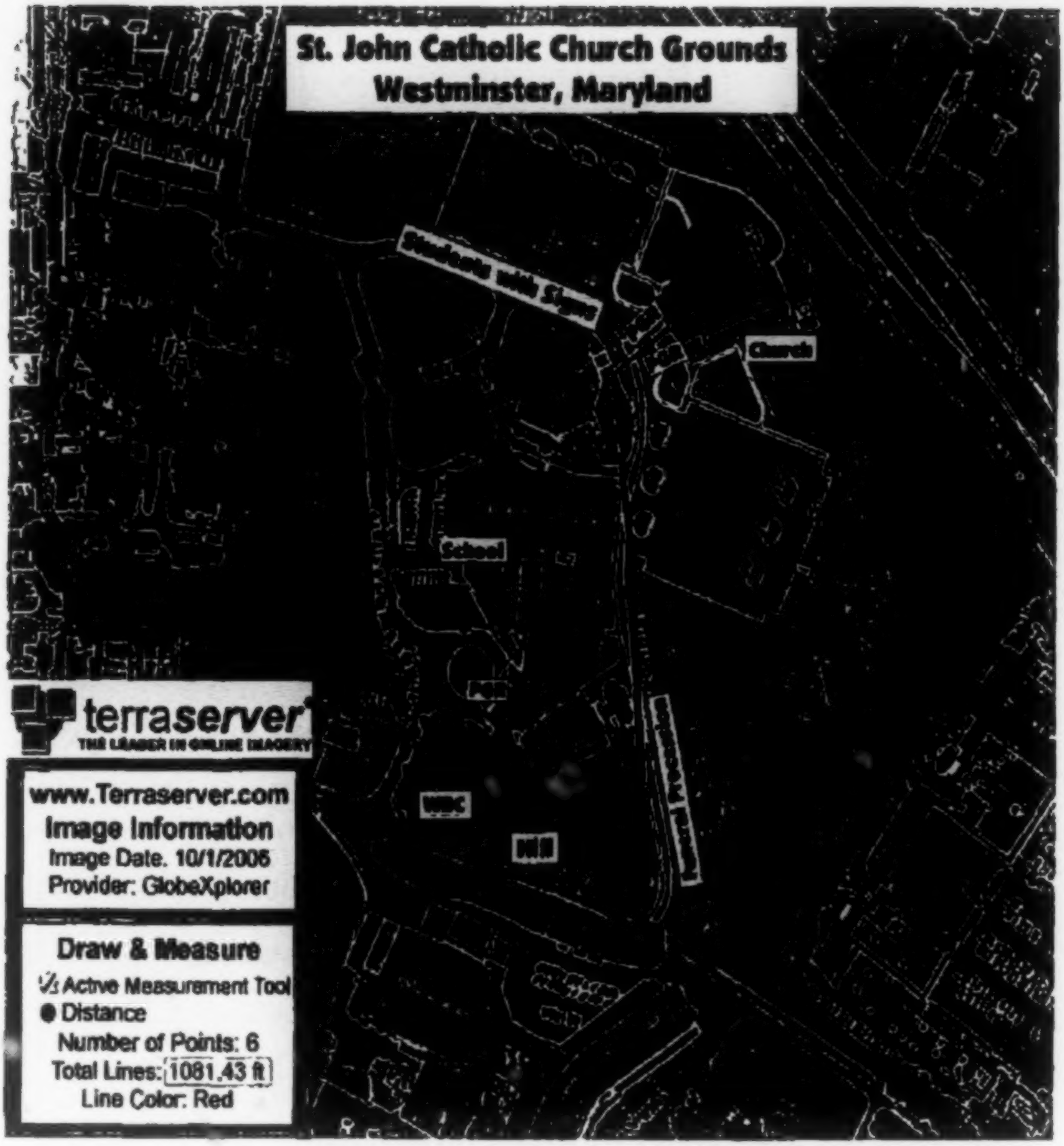
Photograph, Students from St. John School, March 10, 2006 Defendants' Trial Exhibit 42c SA-10

Photograph, Patriot Guard at St. John Church, March 10, 2006 Defendants' Trial Exhibit 42d SA-11

Aerial Map, City of Westminster SA-12

Photograph, Protesters, March 10, 2006 Plaintiff's Trial Exhibit 10 .... SA-13

DVD, Video footage, Walk around St. John Church, July 13, 2007 .... Pocket Part



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Provider: GlobeXplorer

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● Distance
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Total Lines: 1081.43 ft
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SA-1

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York Daily

Obituary: pl. Matthew A. Snyder

March 8, 2006
Section: LOCAL
Page: 02/03

LCpl. Matthew A. Snyder WESTMINSTER, MD Lance Corporal Matthew A. Snyder, USMC, 20, was killed in stantly Friday, March 3, 2006, while on assignment in Al Qaim, Iraq. Stationed out of Twenty Nine Palms, Calif., Matt was on a convoy mission for which he volunteered when the Humvee in which he was traveling overturned. LCpl. Snyder was born July 18, 1985, and lived in Carroll County until he followed his heart and chose to enlist in the USMC upon graduating in 2003 from Westminster High School. After completing training at Parris Island and Camp LeJeune, he was stationed at Twenty-Nine Palms in California, until his deployment to Iraq in February, 2006. Matt was a young man who truly loved and embraced life and he lived his twenty years to the fullest. He attended Sandymount Elementary School and loved sports. He played soccer and baseball for many years through various recreational programs. He also loved everything outdoors, including fishing and being at the beach. He loved hiking and spent many days growing up at Cascade Lake and the Skate Park. Matt was a devoted brother and cousin who enjoyed family parties, playing football games, and swimming in the pool He was a wonderful role model to his younger cousins. Matt was proud to be a Marine and filled the position with dignity. Just before his deployment, Matt said he volunteered for convoy escort security because in his words, "there is a position that needs to be filled and I'm a Marine." Matt was the beloved son of Julia A. Snyder (nee Francis) of Westminster, Md., and Albert L. Snyder of York; and the beloved brother of Sarah Anne and Tracie Lynne. He was the cherished grandson of maternal grandparents, John and Cay Francis, and paternal grandparents, Albert and Rosemary Snyder; great-grandson of maternal grandmother, Helyn Pessaro; dear nephew of Cathy and Grant Menefee, Jane and Tommy Perkins, Andy and Mary Anne Francis, Bonnie Snyder, and Debbie and Mark Krause; loving cousin of Emilie, Luke, and John Menefee, Tommy, Heather, Billy, and Catie Perkins, Drew and Kayla Francis, and Sam and Jess Krause; and many close friends. He was pre-deceased by cousin, Lauren Francis. A Mass of Christian burial will be held in his home parish of St John Catholic Church, 43 Monroe St., Westminster, Md., on Friday at 10·15 a.m. The family will receive friends on Thursday from 1 to 4 p.m. and 6 to 9 p.m. at Pritts Funeral Home, 412 Washington Road, Westminster. Interment will be in Garrison Forest Veterans Cemetery. In lieu of flowers, contributions in Matt's memory may be made to the Disabled American Veterans Memorial Program, P.O Box 14301, Cincinnati, OH 45250-0301 (www.dav.org).

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DEFENDANT'S EXHIBIT NO. 6
CASE NO. RDB 06 1389
IDENTIFICATION: OCT 24 2007
ADMITTED: OCT 24 2007

maryland news > obituaries & death notices

Matthew A. Snyder

View/Sign Guest Book

SNYDER, Matthew A. LANCE CORPORAL MATTHEW A SNYDER USMC, 20, of Westminster, was killed instantly March 3, 2006 while on assignment in Al Qaim, Iraq. Stationed out of Twenty Nine Palms, CA, Matt was on a convoy mission for which he volunteered when the Humvee he was traveling in overturned. LCPL Snyder was born July 18, 1985 and lived in Carroll County until he followed his heart and chose to enlist in the USMC upon graduating in 2003 from Westminster High School. After completing training at Parris Island and Camp LeJeune, he was stationed at Twenty-Nine Palms in CA until his deployment to Iraq in February of 2006. Matt was a young man who truly loved and embraced life and he lived his twenty years to the fullest. He attended Sandymount Elementary School and loved sports. He played soccer and baseball for many years through various recreational programs. He also loved everything outdoors, including fishing and being at the beach. He loved hiking and spent many days growing up at Cascade Lake at the Skate Park. Matt was a devoted brother and cousin, who enjoyed family parties, playing football games and swimming in the pool. He was a wonderful role model to his younger cousins. Matt was proud to be a Marine and filled the position with dignity. Just before his deployment, Matt said he volunteered for convoy escort security because in his words, "there was a position that needs to be filled and I'm a Marine". Matt was the beloved son of Julia A Snyder (nee Francis) of Westminster and Albert L. Snyder of York, PA and the beloved brother of Sarah Anne and Tracie Lynne. He was the cherished grandson of maternal grandparents John and Cay Francis and paternal grandparents Albert and Rosemary Snyder, great-grandson of maternal grandmother Helyn Pessaro, dear nephew of Cathy and Grant Menefee, Jane and Tommy Perkins, Andy and Mary Anne Francis, Bonnie Snyder and Debbie and Mark Krause; loving cousin of Emilie, Luke and John Menefee, Tommy, Heather, Billy and Catie Perkins, Drew and Kayla Francis, Sam and Jess Krause and many close friends. He was predeceased by cousin Lauren Francis. A Mass of Christian Burial will be held in his home parish of St. John Catholic Church, 43 Monroe Street, Westminster of Friday, March 10 at 10:15 a.m. Interment will be in Garrison Forest Veterans Cemetery. The family will receive friends at the Pritts Funeral Home and Chapel, 412 Washington Road, Westminster on Thursday from 1 to 4 and 6 to 9 p.m. In lieu of flowers, memorial contributions may be made in his memory to the Disabled American Veterans Memorial Program, P.O Box 14301, Cincinnati, OH 45250-0301.

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Verizo
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- Moder

Published in the Baltimore Sun on 3/8/2006.
Guest Book • Flowers • Gift Shop • Charities

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Guest Book Highlights

Matthew A. Snyder

December 24, 2006
In recognition of Lance Corporal Matthew A. Snyder's Honorable Service in the United States Marine Corps, the Tri-Cities Tennessee, Detachment Number [illegible] of the Marine Corps League would like to extend our appreciation and

[illegible] (Bristol, VA)

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70
entries in this
Guest Book

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Matthew A. Snyder

LCpl. Matthew A. Snyder WESTMINSTER, MD Lance Corporal Matthew A. Snyder, USMC, 20, was killed in stantly Friday, March 3, 2006, while on assignment in Al Qaim, Iraq. Stationed out of Twenty Nine Palms, Calif., Matt was on a convoy mission for which he volunteered when the Humvee in which he was traveling overturned. LCpl. Snyder was born July 18, 1985, and lived in Carroll County until he followed his heart and chose to enlist in the USMC upon graduating in 2003 from Westminster High School. After completing training at Parris Island and Camp LeJeune, he was stationed at Twenty-Nine Palms in California, until his deployment to Iraq in February, 2006. Matt was a young man who truly loved and embraced life and he lived his twenty years to the fullest. He attended Sandymount Elementary School and loved sports. He played soccer and baseball for many years through various recreational programs. He also loved everything outdoors, including fishing and being at the beach. He loved hiking and spent many days growing up at Cascade Lake and the Skate Park. Matt was a devoted brother and cousin who enjoyed family parties, playing football games, and swimming in the pool. He was a wonderful role model to his younger cousins. Matt was proud to be a Marine and filled the position with dignity. Just before his deployment, Matt said he volunteered for convoy escort security because in his words, "there is a position that needs to be filled and I'm a Marine." Matt was the beloved son of Julia A. Snyder (nee Francis) of Westminster, Md , and Albert L. Snyder of York; and the beloved brother of Sarah Anne and Tracie Lynne. He was the cherished grandson of maternal grandparents, John and Cay Francis, and paternal grandparents, Albert and Rosemary Snyder; great-grandson of maternal grandmother, Helyn Pessaro; dear nephew of Cathy and Grant Menefee, Jane and Tommy Perkins, Andy and Mary Anne Francis, Bonnie Snyder, and Debbie and Mark Krause; loving cousin of Emilie, Luke, and John Menefee, Tommy, Heather, Billy, and Catie Perkins, Drew and Kayla Francis, and Sam and Jess Krause; and many close friends He was pre-deceased by cousin, Lauren Francis. A Mass of Christian burial will be held in his home parish of St. John Catholic Church, 43 Monroe St., Westminster, Md., on Friday at 10:15 a.m. The family will receive friends on Thursday from 1 to 4 p.m. and 6 to 9 p.m. at Pritts Funeral Home, 412 Washington Road, Westminster. Interment will be in Garrison Forest Veterans Cemetery. In lieu of flowers, contributions in Matt's memory may be made to the Disabled American Veterans Memorial Program, P.O. Box 14301, Cincinnati, OH 45250-

0301 (www.dav.org).
Published in the York Daily Record & York Dispatch on 3/8/2006.
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Guest Book Highlights

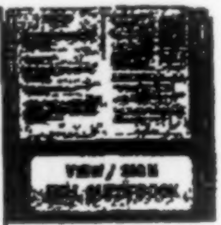
Matthew A. Snyder

◆

August 10, 2006
I believe my son, Lt. Kirby Warne, may have trained with your son at Twenty Nine Palms. He, too, is stationed near Al Qaim. I am so very sorry your son has gone to his other "home." I know you will miss him badly. My condolence as a

SusAnn Warne (Louisville, KY)

More »



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Friday, March 3 2006

LCpl Matthew Snyder

Lance Corporal Matthew A. Snyder, USMC, of Westminster, MD was killed instantly March 3, 2006 while on assignment in Al Qaim, Iraq. Stationed out of Twenty Nine Palms, CA, Matt was on a convoy mission for which he volunteered when the Humvee he was traveling in overturned.

LCpl. Snyder was born July 18, 1985 and lived in Carroll County until he followed his heart and chose to enlist in the USMC upon graduating in 2003 from Westminster High School. After completing training at Parris Island and Camp LeJeune, he was stationed at Twenty-Nine Palms in CA, until he deployment to Iraq in February, 2006.

Matt was a young man who truly loved and embraced life and he lived his twenty years to the fullest. He attended Sandymount Elementary School and loved sports. He played soccer and baseball for many years through various recreational programs. He also loved everything outdoors, including fishing and being at the beach. He loved hiking and spent many days growing up at Cascade Lake and the Skate Park.

Matt was a devoted brother and cousin, who enjoyed family parties, playing football games and swimming in the pool. He was a wonderful role model to his younger cousins. Matt was proud to be a Marine and filled the position with dignity. Just before his deployment, Matt said he volunteered for convoy escort security because in his words, "there was a position that needs to be filled and I'm a Marine."

Matt was the beloved son of Julia A. Snyder (nee Francis) of Westminster, MD and Albert L. Snyder of York, PA and the beloved brother of Sarah Anne and Tracie Lynne. He was the cherished grandson of maternal grandparents John and Cay Francis and paternal grandparents Albert and Rosemary Snyder; great-grandson of maternal grandmother, Helyn Pessaro; dear nephew of Cathy and Grant Menefee, Jane and Tommy Perkins, Andy and Mary Anne Francis, Bonnie Snyder and Debbie and Mark Krause; loving cousin of Emilie, Luke and John Menefee; Tommy, Heather, Billy and Catie Perkins; Drew and Kayla Francis; Sam and Jess Krause; and many close friends. He was pre-deceased by cousin Lauren Francis.

A Mass of Christian burial will be held in his home parish of St. John Catholic Church in Westminster on Friday, March 10, 2006 at 10:15 a.m. There will be a viewing at Pritts Funeral Home on Thursday from 1:00pm - 4:00pm and 6:00pm - 9:00pm. In lieu of flowers, contributions in Matt's memory may be made to the Disabled American Veterans Memorial Program, P.O. Box 14301, Cincinnati, OH 45250-0301 (www.dav.org).

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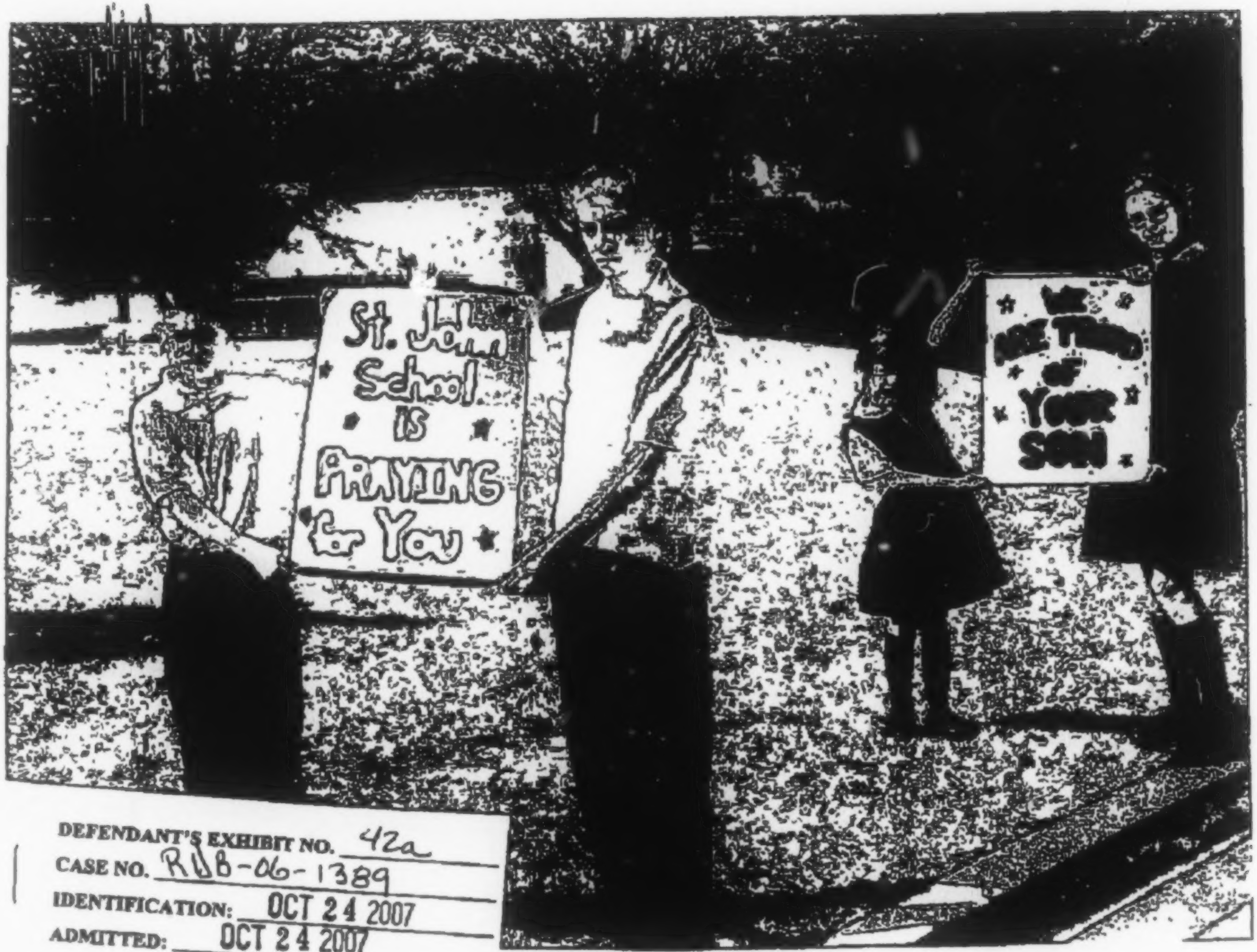
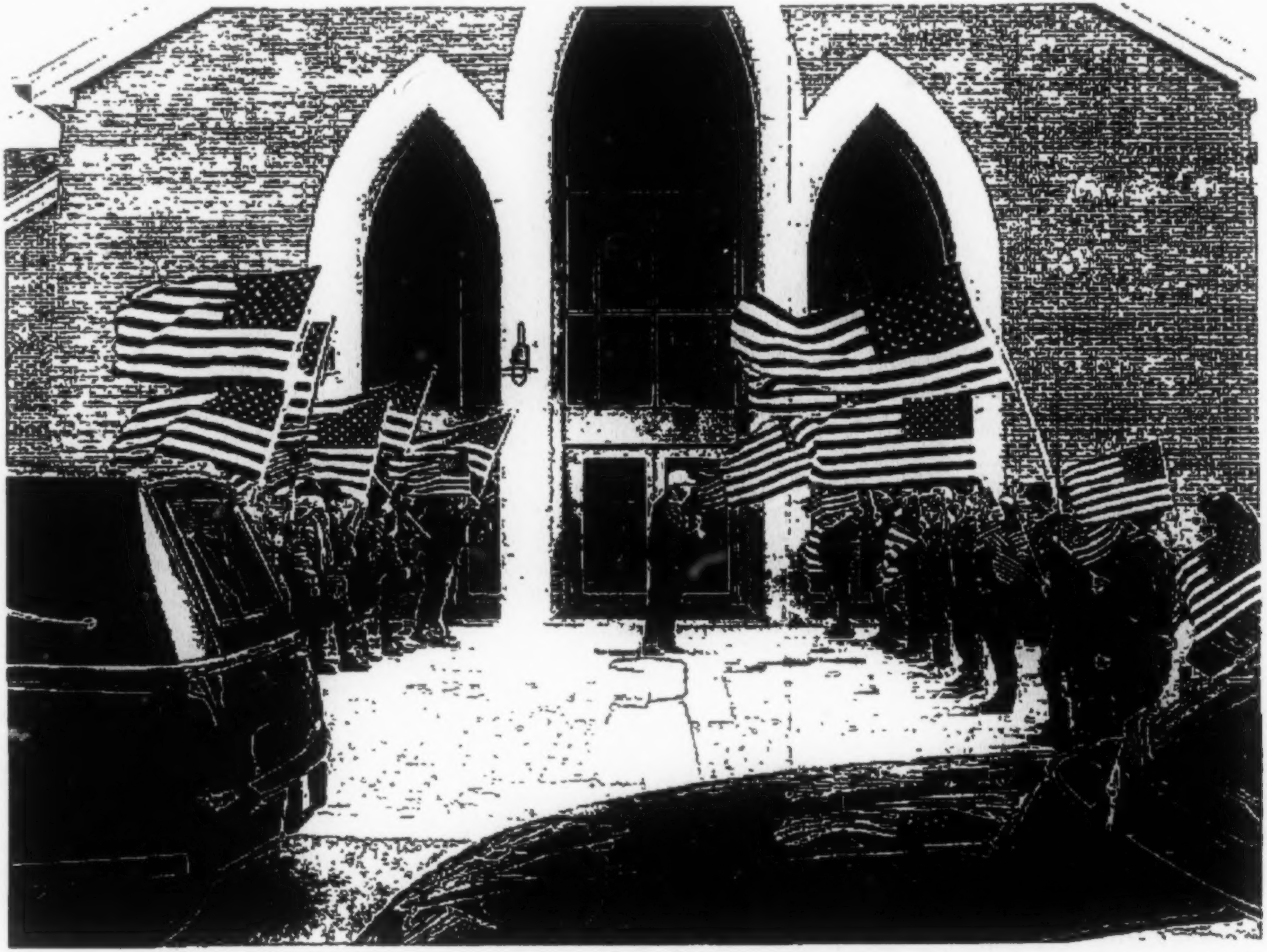

St. John School IS PRAYING for You
WE ARE [illegible] OF YOUR SON

DEFENDANT'S EXHIBIT NO. 42a
CASE NO. RWB-06-1389
IDENTIFICATION: OCT 24 2007
ADMITTED: OCT 24 2007

SA-10



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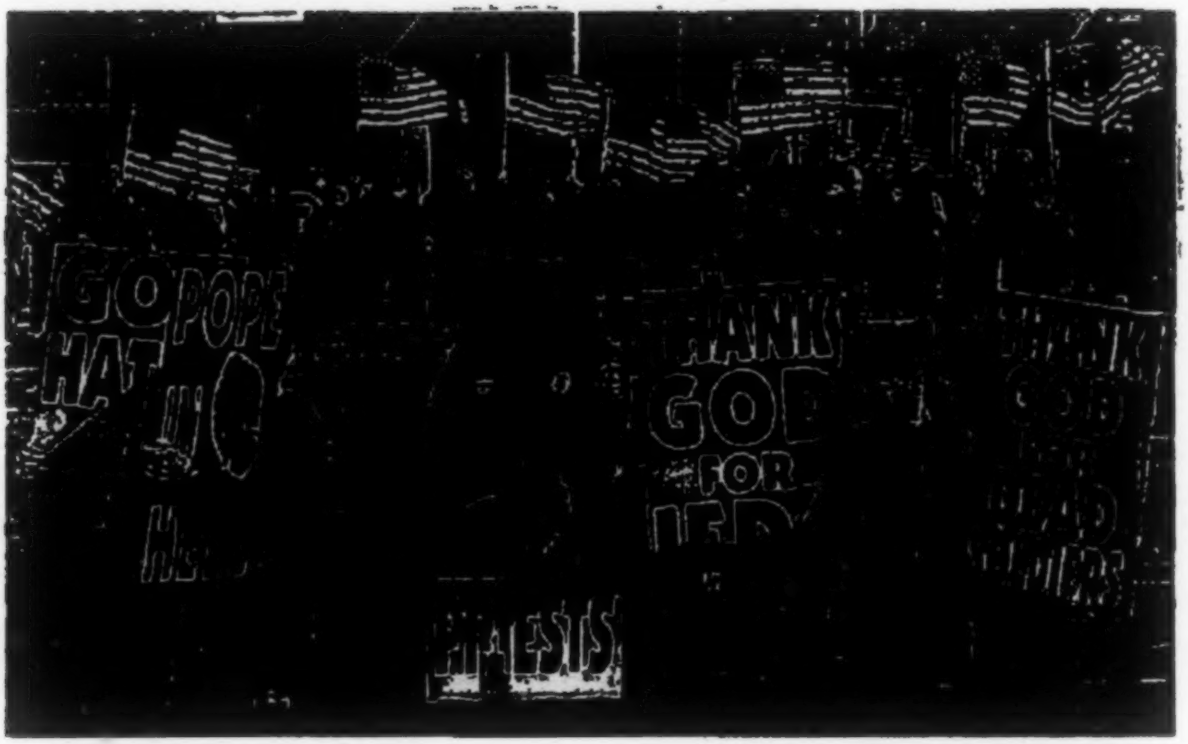

PLAINTIFF'S EXHIBIT
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PLAINTIFF'S EXHIBIT NO. 10
CASE NO. RDB-06-1389
IDENTIFICATION: OCT 24 2007
ADMITTED: OCT 24 2007

E Phelps
EXHIBIT NO. 10
4-16-07
APPINO & BIGGS

PETITIONER'S
BRIEF

Supreme Court, U.S.
FILED
MAY 24 2010
OFFICE OF THE CLERK

No. 09-751

IN THE
Supreme Court of the United States

ALBERT SNYDER,

Petitioner,

v.

FRED W. PHELPS, SR., *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR PETITIONER

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STATEMENT OF THE QUESTIONS

I. Whether the First Amendment permits Mr. Snyder, a private figure plaintiff who had no connection to the "issues" cited by the Phelpses, to seek judicial recourse for the harm intentionally inflicted upon him by the Phelpses' tortious conduct?

II. Whether Mr. Snyder should not be required to prove that the Phelpses' speech could "reasonably be interpreted as stating actual facts" in order to recover for intentional infliction of emotional distress?

III. Whether Mr. Snyder, as a member of a captive audience mourning the loss of his son at a funeral, is entitled to a remedy for the Phelpses' intentional invasion of his privacy?

IV. Whether Mr. Snyder's First Amendment rights to free exercise of religion and peaceable assembly should outweigh the Phelpses' First Amendment right to target hateful speech at him during his son's funeral?

PARTIES TO THE PROCEEDING

The parties to the proceeding in the United States Court of Appeals for the Fourth Circuit were Albert Snyder, Fred W. Phelps, Sr., Westboro Baptist Church, Inc., Rebekah A. Phelps-Davis, Shirley L. Phelps-Roper, and several John and Jane Doe Defendants-Appellants.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is reported at *Snyder v. Phelps, et al.*, 580 F.3d 206 (4th Cir. 2009), and is reproduced in the petition for writ of certiorari. Pet. App. A. The Fourth Circuit reversed the October 31, 2007, jury verdict and the post-verdict decision of the United States District Court for the District of Maryland, reported at 533 F. Supp. 2d 567 (D. Md. 2008), also reproduced in the petition for writ of certiorari. Pet. App. B.

STATEMENT OF JURISDICTION

The Court of Appeals issued its decision on September 24, 2009. Pet. App. A. This Court granted Mr. Snyder's petition for writ of certiorari. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1) and Supreme Court Rule 13.3.

CONSTITUTIONAL PROVISIONS, STATUTES, REGULATIONS INVOLVED

U.S. Const. amend. I:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. amend. XIV, § 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

This case centers on a funeral protest and written "epic" targeted at the family of Matthew Snyder, a United States Marine killed in the line of duty. Searching for funerals of military personnel, Respondents (hereinafter "the Phelpses") traveled from Kansas to Maryland and stationed themselves outside of the church on the day of Matthew's funeral holding signs reading, among other things, "Thank God for Dead Soldiers," "God Hates Fags," and "You're Going to Hell." They also posted a lengthy, epithet-filled "epic poem" on their website titled, "The Burden of Marine Lance Cpl. Matthew A. Snyder" (hereinafter "the Epic"). Matthew Snyder's father, Albert Snyder (hereinafter "Mr. Snyder"), who became violently ill at the sight of the Phelpses' website and whose diabetes and depression worsened as a result of the Phelpses' intentionally harmful conduct, sued in tort and won a jury verdict against them. This jury verdict was upheld by the District Court, which rejected the Phelpses' free speech and free exercise arguments. The Court of

Appeals for the Fourth Circuit, however, reversed. Adopting the Phelpses' argument that their expressive conduct qualified as "rhetorical hyperbole" absolutely protected by the First Amendment, the Fourth Circuit immunized the Phelpses from any tort liability arising out of their protest or their Epic.

I. Statement of the Facts

After high school, Matthew Snyder fulfilled a life-long dream and enlisted in the United States Marine Corps, ultimately rising to the rank of Lance Corporal. (Vol. VIII at 2063.)[1] On March 3, 2006, two uniformed Marines arrived at Mr. Snyder's home and informed him that his only son had been killed in Al Anbar Province, Iraq. (Vol. VII at 2064.) With heavy hearts, the Snyder family planned a traditional private burial service at their family church, St. John's Catholic Church in Westminster, Maryland. (Vol. VII at 2065, 2083.) Mr. Snyder testified that his family "wanted it to be a private funeral." (Vol. VIII at 2247.) At the funeral service, Marines ensured that the Snyder family received the full military honors to which fallen soldiers and their families are entitled. (Vol. VII at 2073.) The family held two viewings: one on March 9, 2006, for friends and extended family, and a second just prior to the funeral on March 10, 2006, for immediate family and a few friends. (Vol. VIII at 2156.)

On March 8, 2006, as Matthew's body arrived in the United States, the Phelpses—members of the Westboro

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[1] References are to the Appendix submitted to the Court of Appeals.

Baptist Church (hereinafter "the WBC")—announced their intent to protest:

> WBC to picket funeral of Lance Cpl. Matthew A. Snyder—at 10:15 a.m., Friday, Mar. 10, at St. John's Catholic dog kennel, 43 Monroe St., Westminster, Maryland. Killed by IED—like the IED America bombed WBC with in a terroristic effort to silence our anti-gay Gospel preaching by violence.

(Vol. VIII at 2156, 2195.) Mr. Snyder knew that the Phelpses would be present; nonetheless, he attempted to put them out of his mind and focus instead on his son's burial. On the day of the funeral, the Phelpses placed themselves at the main entrance of St. John's Catholic Church property to ensure that Mr. Snyder and his family would encounter them. In response, Matthew Snyder's funeral procession was re-directed to an alternate entrance. (Vol. VIII at 2244.) Even after readjusting their route, the Snyders were only 200–300 feet from the Phelpses during the funeral procession. (Vol. VII at 2079, 2141.) On the way from the viewing to the funeral, as Mr. Snyder was trying to focus on the memory of his son, he looked at his daughters and saw the Phelpses' signs behind them. (Vol. VIII at 2144.)

Unsurprisingly, the Phelpses' presence turned Matthew Snyder's funeral into a circus. (Vol. VII at 2082.) Even according to *the Phelpses' expert*, they were a "petty irritant." (Vol. X at 2571.) The Phelpses staged their protest directly in front of the St. John's Catholic elementary school and across the street from a public school. (Vol. VIII at 2242, 2249.) To mitigate the harm the Phelpses' presence and activities would have on the school children, the school mandated that all blinds be closed, covered doors and windows facing the Phelpses with paper, and offered "excused absences" to children whose parents chose to keep them out that day. (Vol. VIII at 2249–2250.) According to the testimony of Father Leo Patalinghug, the associate pastor at St. John's, the Phelpses' presence eliminated the "peaceful experience for our school or the community." (Vol. VIII at 2251.)

The Phelpses brought various signs with them to Westminster, Maryland, as part of their protest of Matthew's funeral. One of the signs read, "Thank God for Dead Soldiers." Mr. Snyder testified that he took the sign to mean that the Phelpses were "thanking God [his] son was dead." (Vol. VIII at 2113.) Additionally, the Phelpses attacked Mr. Snyder's religion at a time when he was particularly vulnerable: one of the Phelpses' signs read, "Priests Rape Boys." (Vol. VIII at 2115.) Several other signs included phrases directed specifically at Mr. Snyder's deceased son: "You're Going to Hell" and "God Hates You." These signs made Mr. Snyder "sick" because his son "was the only dead person there," and the signs "were definitely directed at" him. (Vol. VIII at 2119, 2121.) Though Matthew Snyder was not homosexual, at least two signs used a homophobic epithet (Vol. VIII at 2120, 2196) while another included a picture of two males performing anal sexual intercourse.[2] (Vol. VII at 2088–2089; Vol. VIII at

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[2] The Phelpses' expert concluded that the picture of men performing anal sexual intercourse had no causal connection to the Phelpses' religion. (Vol. X, 2626).

2118, 2203–2204.) Even Fred Phelps, Sr., admitted that grieving family members would be offended by the latter sign. (Vol. VIII at 2205.)

The Phelpses' expert agreed that their signs were "personal" to the Snyder family. (Vol. X at 2572.) When discussing the "Thank God for Dead Soldiers" sign, the Phelpses' expert testified, "I think that goes a little bit further than protesting against a war." (Vol. X at 2572.) He further explained the consequences of the Phelpses' actions with regard to Mr. Snyder's depression: "[I]t interfered with the process that we go through of honoring our soldiers who die for their country and also could have surely interfered with the grieving process and allowing him to be a hero without any tarnish on his casket." (Vol. X at 2578.) In other words, the Phelpses' own expert witness conceded that their actions were intentionally targeted at Mr. Snyder and caused him harm.

Fred Phelps, Sr., candidly explained that his motive behind protesting military funerals was to seek revenge. According to Phelps, approximately three years before trial, members of the WBC were assaulted by Marines. (Vol. VIII at 2226.) In retaliation, WBC members began protesting military funerals and have continually terrorized grieving military families since the alleged assault. For example, the Phelpses created "Sign Movies" that replicated their protest of Matthew Snyder's funeral. (Vol. VIII at 2216.) Further, it was the Phelpses' stated goal to "place a little bug in" in Mr. Snyder's head. (Vol. VIII at 2111–2112.) The Phelpses knew that their conduct on March 10, 2006, was tantamount to "pouring salt into the wound" and understood that they were not welcome at the funeral. (Vol. VIII at 2206, 2237.)

The Phelpses also knew, and their legal counsel conceded, that their presence at the funeral created a credible threat of violence. (Vol. VIII at 2281; Vol. XIV at 3776.) The local police deployed the S.W.A.T. team. (Vol. VIII at 2268, 2271.) Additional state, county, and local police collaborated to control potential violence. (Vol. VIII at 2272.) A mobile command center was deployed to coordinate the various law enforcement agencies. (Vol. VIII at 2274.) Five sheriffs in five patrol cars escorted the Phelpses to the church for the sole purpose of protecting them. (Vol. VIII at 2284.) The Phelpses' presence did, in fact, provoke some reaction from funeral-goers and passersby; however, police were able to prevent any violence from occurring. (Vol. VIII at 2286–2287.)

The Phelpses continued to target the Snyder family even after the funeral. Specifically, the Phelpses created an "epic poem" titled, "The Burden of Marine Lance Cpl. Matthew A. Snyder," and posted it on their website. (Vol. XV at 3788.) The Epic stated, in part,

> God blessed you, Mr. and Mrs. Snyder, with a resource and his name was Matthew. He was an arrow in your quiver! In thanks to God for the comfort the child could bring you, you had a DUTY to prepare that child to serve the LORD his God—PERIOD! You did just the opposite—you raised him for the devil. . . . Albert and Julie RIPPED that body apart and

> taught Matthew to defy his Creator, to divorce, and to commit adultery. They taught him to support the largest pedophile machine in the history of the entire world, the Roman Catholic monstrosity. Every dime they gave the Roman Catholic monster they condemned their souls. They also, in supporting satanic Catholicism, taught Matthew to be an idolater.

(Vol. XV at 3791.) The Phelpses proclaimed that God "killed Matthew so that His servants would have an opportunity to preach His words to the U.S. Naval Academy at Annapolis, the Maryland Legislature, and the whorehouse called St. John Catholic Church at Westminster where Matthew fulfilled his calling." (Vol. XV at 3793.) Not surprisingly, the Phelpses' own expert agreed that the Epic "was directed at a particular individual or particular family." (Vol. X at 2618.) The Phelpses' personal attacks on the Snyder family—and Matthew Snyder, in particular—caused Mr. Snyder to vomit when he read the Epic. (Vol. VIII at 2130.)

Mr. Snyder testified that the Phelpses' conduct has harmed his mental and physical wellbeing. (Vol. VIII at 2145.) When he thinks of his son's funeral, "it always turns into the bad." (Vol. VIII at 2139.) The Phelpses' conduct exacerbated Mr. Snyder's diabetes. (Vol. VIII at 2145.) In describing the permanent effect of the Phelpses' actions, Mr. Snyder stated, "I look at this as an assault on me. Somebody could have stabbed me in the arm or in the back and the wound would have healed. But I don't think this will heal." (Vol. VIII at 2145.)

It is undisputed that none of the Phelpses knew any of the Snyders personally. (Vol. VIII at 2110.) Mr. Snyder was not involved in the media or show business and has never pursued political office. (Vol. VIII at 2146–2147.) He did not participate in any peace, pro-war, or anti-war activities. (Vol. VIII at 2158.) Indeed, the Phelpses concede that Mr. Snyder did not have any political clout or the ability to change policy. (Vol. VIII at 2210.)

As Mr. Snyder's expert testified, funerals have a strong therapeutic value. (Vol. XI at 2728.) Funerals concerning sudden deaths like Matthew Snyder's have more of a significance because there is no time to say goodbye to the decedent when the death is unexpected. (Vol. XI at 2730.) Further, military funerals are particularly helpful to the grieving family and provide a "meaningful part of the ceremony." (Vol. XI at 2731.)

The importance and solemnity of funeral ceremonies is so universally accepted that, in all of recorded history, the Phelpses are the only individuals who have chosen to protest at funerals. (Vol. XI at 2732.) By targeting Mr. Snyder's faith and his son's status as a military casualty, the Phelpses intentionally interfered with Mr. Snyder's grieving process and caused him lasting physical and emotional harm. (Vol. XI at 2734, 2742.) Mr. Snyder will never have another opportunity to bury his son, and he will associate memories of his son with the Phelpses' hateful epithets and conduct for the rest of his life.

II. Procedural History

A. The District Court Opinion

On October 31, 2007, a jury found that the Phelpses' conduct towards Mr. Snyder constituted intentional infliction of emotional distress, invasion of privacy by intrusion upon seclusion, and conspiracy, awarding him $10.9 million in compensatory and punitive damages. The Phelpses moved for judgment as a matter of law, judgment notwithstanding the verdict, reconsideration and rehearing, a new trial, relief from judgment, relief of law and equity, and remittitur, alleging, *inter alia*, that their conduct was absolutely protected under the First Amendment and, in the alternative, that Mr. Snyder did not meet the elements of the claims alleged. The District Court rejected both of these arguments but ultimately granted a remittitur of the $8 million punitive damages award on due process grounds, lowering it to $2.1 million.

The District Court began its discussion of the Phelpses' "First Amendment defense" with the recognition that "there is not an absolute First Amendment right for any and all speech directed by private individuals against other private individuals." *Snyder v. Phelps*, 533 F. Supp. 2d 567, 576–77 (D. Md. 2008) (*citing Dun & Bradstreet, Inc. v. Greenmoss Builders*, 472 U.S. 749, 758 (1985)). The District Court specifically rejected the Phelpses's contention that Matthew Snyder became a public figure "upon the filing of information in the obituary section of any newspaper," noting that Mr. Snyder did not "invite attention and comment" to the funeral and that the notoriety his deceased son received as a result of the *Phelpses'* actions did not "transform a private funeral into a public event" or make Matthew Snyder a public figure. *Id.* at 577 (*citing Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345 (1974)). The District Court further observed that the Phelpses "created an atmosphere of confrontation" at the funeral by carrying "signs that could reasonably be interpreted as being directed at the Snyder family." *Id.* The Court acknowledged that "signs expressing general points of view are afforded First Amendment protection." *Id.* at 578. Nevertheless, the Phelpses' protest and the Epic created issues of fact for the jury, which reasonably determined that Mr. Snyder had proven the elements of intentional infliction of emotional distress, invasion of privacy, and conspiracy under Maryland law. *Id.*

The Phelpses alternatively argued that their conduct was protected by the Free Exercise Clause of the First Amendment, asserting that "any comments and opinions expressed on signs or on their website were expressions of their fundamentalist religious beliefs." *Id.* In this vein, the Phelpses had presented to the jury a series of DVD video productions, including one titled, "Thank God for 9/11," in which members of the WBC celebrated the events of September 11, 2001, as a demonstration of God's hatred of America. *Id.* at 578 n.11. The District Court gave this argument short shrift, noting that the Phelpses' own "religious expert" acknowledged that "there was no Biblical or religious connection to [the Phelpses'] choice of demonstrations at military funerals." *Id.* at 578. Moreover, the Phelpses had "essentially acknowledged in their testimony that their choice of military funerals was driven by the publicity the demonstrations generated." *Id.*

Finally, the District Court described the state's interest in providing a tort remedy to its citizens for intentionally harmful conduct. *Id.* at 579. Consistent with Supreme Court precedent, the Court observed that "this case involves balancing [the Phelpses' First Amendment] rights with the rights of other private citizens to avoid being verbally assaulted by outrageous speech and comment during a time of bereavement." *Id.* Moreover, the Court noted, "an individual's First Amendment rights must be balanced against a *state's* interest in protecting its citizens." *Id.* (emphasis added). The Court held that the appropriate balance permitted the imposition of tort liability in the instant case. *Id.* at 579–80.

The District Court similarly rejected the Phelpses' contentions regarding the sufficiency of the evidence. As to the intentional infliction of emotional distress claim, Mr. Snyder was required to prove that the "'defendant[s], intentionally or recklessly, engaged in extreme and outrageous conduct that caused the plaintiff to suffer severe emotional distress.'" *Id.* at 580 (*quoting Miller v. Bristol-Myers Squibb Co.*, 121 F. Supp. 2d 831, 839 (D. Md. 2000)). The Court rejected the Phelpses' argument that "the *only* way to satisfy the requirements of 'highly offensive' or 'extreme and outrageous' is to go to the content of religious speech"—*i.e.*, that any form of expressive conduct with religious overtones is immune from all regulation or liability. On the contrary, the District Court noted that the jury had been properly instructed and held that the evidence was sufficient to find that Mr. Snyder had met his burden. *Snyder*, 533 F. Supp. 2d at 580–81.

As to the "intrusion upon seclusion" claim, Maryland law required Mr. Snyder to prove that the Phelpses intentionally intruded upon his solitude, private affairs, or concerns in a manner that would be highly offensive to a reasonable person. (Vol. XI at 3004.) The District Court held that the evidence was sufficient for the jury to find that Mr. Snyder had met this burden. The Phelpses' signs, protest, television interviews, and Epic, the Court observed, "unreasonably invaded Snyder's privacy and intruded upon his seclusion during a time of bereavement." *Snyder*, 533 F. Supp. 2d at 581.

Finally, as to the civil conspiracy claim, the District Court observed that the Phelpses did not dispute the existence of an agreement to commit the challenged acts. *Id.* The jury had been properly instructed that "under Maryland law [Mr. Snyder] had to show that there was an agreement by at least two persons to accomplish an unlawful act, and that the act resulted in damages to Plaintiff." *Id.* at 581–82; (Vol. XI at 3005.) Further, "[t]he jury was specifically instructed that it could not find [the Phelpses] liable for civil conspiracy unless it found them liable for either intentional infliction of emotional distress or invasion of privacy by intrusion upon seclusion." *Snyder*, 533 F. Supp. 2d at 582. Given its analysis upholding the jury verdicts on both substantive torts, the Court upheld the civil conspiracy verdict. *Id.*

The Phelpses also argued that the evidence was insufficient to support the compensatory and punitive damages awarded by the jury. Applying Maryland law, the Court determined that the compensatory damages award did not "shock the conscience," given the expert testimony regarding the harm that Mr. Snyder suffered as a result of the Phelpses' conduct. *Id.* at 585–89. With respect to punitive damages, the Court first noted that such damages were only available where a defendant acted with "actual malice" and that the jury had properly been instructed that "[a]n act is done maliciously if it is done with a sense of hate, ill-will, spite, or a desire to inflict unnecessary injury." *Id.* at 589; (Vol. XI at 3009.) Though the Court ultimately determined that due process required a remittitur, it also held that "utilizing Matthew Snyder's death as a vehicle for hateful expression was sufficient to support a punitive damages award." *Snyder*, 533 F. Supp. 2d at 590–96.

B. The Fourth Circuit Opinion

On September 24, 2009, the Fourth Circuit reversed the decision of the District Court, adopting the Phelpses' argument that their conduct was absolutely protected by the First Amendment. *Snyder v. Phelps*, 580 F.3d 206, 226 (4th Cir. 2009). The Court grounded its analysis in an extension of *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988), and *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990). *See Snyder*, 580 F.3d at 217. These cases, the Court asserted, provide an immunity from tort to speakers of "rhetorical hyperbole." *Id.* at 220. Concluding that the Phelpses' funeral protest and the Epic fell squarely into this category, the Court immunized the Phelpses from tort liability. *Id.* at 226.

The Fourth Circuit began its analysis by acknowledging the intentional and targeted nature of the Phelpses' conduct. The Court explained that the Phelpses had traveled to Matthew's funeral solely to "publicize their message of God's hatred of America for its tolerance of homosexuality." *Id.* at 212.[3] The Court recognized that the Phelpses had utilized Matthew's funeral as a vehicle for their message. *Id.* Finally, the Court acknowledged that the Phelpses did *not* challenge the sufficiency of the evidence underlying the District Court's decision and that, accordingly, the constitutional issues presented by the Phelpses' conduct could not be avoided. *Id.* at 216–17.

The Court then moved into its analysis of the Supreme Court's First Amendment jurisprudence. Citing *New York Times v. Sullivan*, 376 U.S. 254, 279–80 (1964), the Court noted that public officials are barred from recovering damages for the common law tort of defamation unless the defamatory statement was made with "actual malice," defined as "knowing falsity or reckless disregard for the truth." *Snyder*, 580 F.3d at 218. The Court acknowledged that the Supreme Court has stopped short of extending the *New York Times* standard to private figures. *Id.* (*citing Gertz*, 418 U.S. at 344–46). Nevertheless, the Court then cited what it characterized as a "distinct but related line of decisions [in which] the [Supreme] Court has recognized that there are constitutional limits on the *type* of speech to which state tort liability may attach." *Id.* According to the Fourth Circuit, these cases—*Hustler* and *Milkovich*—stand for the proposition that "the First Amendment will *fully* protect 'statements that cannot "reasonably be interpreted as stating actual facts" about an individual.'" *Id.* (*quoting Milkovich*, 497 U.S.

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[3] As noted *infra*, however, many of the Phelpses' signs and much of the Epic had no apparent connection to this issue.

at 20; *Hustler*, 485 U.S. at 50) (emphasis added). Further, citing *Milkovich*, the Fourth Circuit held that there are "two subcategories of speech that cannot reasonably be interpreted as stating actual facts about an individual, and that thus constitute speech that is constitutionally protected": (1) statements on "matters of public concern that fail to contain a 'provably false factual connotation,'" and (2) "rhetorical hyperbole," defined as "rhetorical statements employing 'loose, figurative, or hyperbolic language.'" *Id.* at 219–20 (*citing Milkovich*, 497 U.S. at 20–21). With respect to the second subcategory, the Court made clear that, in its view, such "rhetorical hyperbole" was entitled to absolute First Amendment protection regardless of its subject matter or target. *Id.* at 218 (*citing Deupree v. Iliff*, 860 F.2d 300, 304–05 (8th Cir. 1988), for the proposition that "certain types of speech are protected regardless of plaintiff's status as private or public figure").

Applying these principles to the Phelpses' speech, the Court held that the District Court had erred in analyzing whether Mr. Snyder was a public or private figure and whether Matthew Snyder's funeral was a public or private event; in the Court's view, these issues were irrelevant if the "type" of speech at issue was entitled to absolute protection. *Id.* at 222. The Court then divided the Phelpses' statements into several categories. The Court grouped together the signs stating, "America is Doomed," "God Hates the USA/ Thank God for 9/11," "Pope in Hell," "Fag Troops," "Semper Fi Fags," "Thank God for Dead Soldiers," "Don't Pray for the USA," "Thank God for IEDs," "Priests Rape Boys," and "God Hates Fags." *Id.* at 222–

23. These signs, the Court concluded, were entitled to absolute First Amendment protection because they involved matters of "public concern, including the issue of homosexuals in the military, the sex-abuse scandal within the Catholic Church, and the political and moral conduct of the United States and its citizens." *Id.* at 223. The Court also explained that these statements would be protected because "no reasonable reader could interpret any of these signs as asserting actual and objectively verifiable facts about Snyder or his son." *Id.* Indeed, the Court opined, these statements "contain imaginative and hyperbolic rhetoric intended to spark debate about issues with which the Defendants are concerned." *Id.* (*citing CACI Premier Tech., Inc. v. Rhodes*, 536 F.3d 280 (4th Cir. 2008)).

Next, the Court conceded that signs stating, "You're Going to Hell" and "God Hates You" presented a closer question. *Id.* at 224. The Court suggested that the term "You" could be interpreted as referring to either an individual or a collective audience and, thus, that "[t]he meaning of these signs is ambiguous." *Id.* The Court opined, however, that it was not necessary to resolve this ambiguity for two reasons. First, the Court concluded that a reasonable person could not interpret the statements as asserting actual and provable facts. *Id.* Second, the Court maintained that the signs "contain strong elements of rhetorical hyperbole and figurative expression." *Id.* The Court reasoned that the context and tenor of the speech, as well as the Phelpses' use of "irreverent and indefinite language," negated the impression that they asserted actual facts about Matthew Snyder. *Id.*

Finally, the Court addressed the Epic. Acknowledging that the Epic contained specific references to the Snyder family, the Court nevertheless held that "the Epic cannot be divorced from the general context of the funeral protest." *Id.* at 225. The Court framed the Epic as a "recap" of the protest, noting that the Phelpses had "utilized distasteful and offensive words, atypical capitalization, and exaggerated punctuation, all of which suggest the work of a hysterical protestor rather than an objective reporter of facts." *Id.* Further, the Court explained, the Epic was "primarily" concerned with the Phelpses' views on matters of public concern. *Id.* The Court ultimately concluded that a reasonable reader would not understand the Epic to assert actual facts about Mr. Snyder or his deceased son but, rather, as "loose, figurative, or hyperbolic language." *Id.* at 225–26. Accordingly, the Court held that the Epic was entitled to absolute First Amendment protection. *Id.*

SUMMARY OF ARGUMENT

I. Contrary to the Fourth Circuit's opinion, this Court has never granted absolute, categorical protection to speech that cannot "reasonably be interpreted as stating actual facts"; rather, the Court has granted certain types of speech heightened First Amendment protection only after considering the competing interests of the speaker, the listener, and the state. The Fourth Circuit's reliance on *Hustler v. Falwell* is misplaced because that case dealt with a public figure plaintiff. Where, as here, a private individual has done nothing to attach himself to a public event or controversy, there is no reason for the Court to extend absolute protection to expressive conduct that intentionally harms that individual.

The Fourth Circuit also erred by unilaterally adopting the Phelpses' interpretation of their expressive conduct rather than examining that conduct within the broader context of the facts presented, without any deference to the fact finder. The signs and the Epic themselves did not, on their face, relate to matters of public concern, and the Phelpses admitted that they did not begin protesting military funerals until several members of the WBC were accosted by Marines. These facts suggest—and the jury apparently believed—that the Phelpses' expressive conduct did *not* relate to "homosexuals in the military, the sex abuse scandal within the Catholic Church, and the political and moral conduct of the United States and its citizens" but, instead, was what it appeared to be at first glance: harmful epithets being hurled at Mr. Snyder and his family in retaliation for this prior, unrelated physical assault.

Finally, the First Amendment protects speakers from tort liability only when there is a reasonable relationship between the "matter of public concern" and the speech's target. Here, Mr. Snyder has no rational connection to any of the purported "matters of public concern" that the Phelpses maintain they were protesting. The Phelpses should not be protected from tort liability because they unilaterally associated Mr. Snyder with their selected "issues."

II. The rule formulated by the Fourth Circuit prevents recovery under all causes of action brought by plaintiffs who are intentionally harmed by statements that cannot be proved true or false. The Court's ruling that extreme and outrageous statements are merely "rhetorical hyperbole" completely vitiates the tort of intentional infliction of emotional distress. It turns outrageousness from the threshold element of the tort into an affirmative defense. The common law requirement of outrageousness in the tort of intentional infliction of emotional distress is sufficient to provide a jury with an adequate means of distinguishing actionable from non-actionable expressive conduct.

III. Under the "captive audience" doctrine, the First Amendment rights of speakers may be curtailed when the listener's constitutional right to privacy justifies protection from the unwanted message. The privacy interest in avoiding unwanted communications varies according to the circumstances. This Court has recognized a survivor's right to privacy in protecting the memory of the dead. Thus, Mr. Snyder had a substantial privacy interest in attending his son's funeral without unwanted interference. The Phelpses' conduct during Matthew Snyder's funeral caused Mr. Snyder serious emotional and physical hardship and hindered his grieving process. Mr. Snyder was forced to tolerate the outrageous conduct that the Phelpses specifically directed at him during his son's funeral service. The Phelpses' conduct therefore interfered with Mr. Snyder's privacy interest in an intolerable manner.

IV. When the Fourth Circuit immunized the Phelpses from liability for their expressive conduct, it necessarily subordinated Mr. Snyder's First Amendment rights of free exercise and peaceful assembly. This Court has a history of balancing rights when evaluating free speech claims and conduct. This Court should consider, in that framework, Mr. Snyder's First Amendment rights of free exercise and assembly. The Phelpses' freedom of speech should have ended where it conflicted with Mr. Snyder's freedom to participate in his son's funeral, which was intended to be a solemn religious gathering.

ARGUMENT

The Fourth Circuit decision is striking for several reasons. First, while purporting to follow existing First Amendment jurisprudence, the Court created a new rule of law by requiring private plaintiffs to prove that intentionally harmful expressive conduct directed against them could "reasonably be interpreted as stating actual facts" about them regardless of its context or subject matter. Second, the Court relied on *Milkovich* for its protection of certain categories of speech but did not give due consideration to the differences between defamation and other torts. Third, the Court granted categorical protection to the Phelpses' speech without analyzing the state's interest in providing a tort remedy to captive audiences targeted by expressive conduct. Finally, the Fourth Circuit did not even attempt to balance the Phelpses' First Amendment free speech right against Mr. Snyder's First Amendment rights of free exercise and peaceable assembly.

This Court has never employed a categorical approach to the Free Speech Clause of the First Amendment. Indeed, the Court has resisted creating wholesale tort exemptions for particular categories of speech and, instead, has consistently balanced speakers' interests against the competing interests of the state and other private individuals. By holding that "rhetorical hyperbole" receives absolute First Amendment protection in all circumstances, the Fourth Circuit departed from judicial precedent and left private individuals who suffer intentionally inflicted emotional harm without recourse. Such an extension of First Amendment protection is unwarranted.

I. The First Amendment Permits Mr. Snyder to Seek Judicial Recourse for the Harm Intentionally Inflicted Upon Him by the Phelpses' Tortious Conduct.

A. As a Private Figure Plaintiff, Mr. Snyder Should Not Be Required to Prove that the Phelpses' Statements Could Reasonably be Read to State Actual Facts.

The Fourth Circuit asserted that, "[t]he Supreme Court has created a separate line of First Amendment precedent that is specifically concerned with the constitutional protections afforded to certain *types* of speech, and that does not depend upon the public or private status of the speech's target." *Snyder*, 580 F.3d 206, 222 (*citing Milkovich*, 497 U.S. at 16; *Hustler Magazine*, 485 U.S. at 50). A summary review of existing First Amendment jurisprudence and the express language of the *Hustler* and *Milkovich* decisions reveals that this statement is simply incorrect; although certain types of speech receive heightened First Amendment protection in particular contexts, this Court has granted such protection only after considering the competing interests of the speaker, the listener, and the state. Moreover, courts generally recognize a distinction between "speech, however crude, somehow contributing to the public debate about a public figure or a matter of public concern . . . and speech intended merely to harass or cause others to harass the target. Speech of the latter sort is not entitled to First Amendment protection." *State v. Carpenter*, 171 P.3d 41, 57 (Alaska 2007). Rhetorical hyperbole about a public figure falls squarely in the former category because one "'of the prerogatives of American citizenship is the right to criticize public men and measures.'" *Hustler*, 485 U.S. at 51 (*quoting Baumgartner v. U.S.*, 322 U.S. 665, 673–74 (1944)). Rhetorical hyperbole targeting private figures is not equally positioned: such individuals have not voluntarily accepted an increased risk of emotional harm by stepping into the public arena and, unlike public figures, are not likely to have effective opportunities to counter the harmful speech with communications of their own. *See Gertz*, 418 U.S. at 344. Accordingly, this Court should not extend First Amendment protection to outrageous, intentionally harmful expressive conduct targeted at private individuals.

The constitutional regulation of tort actions based on speech began less than a half century ago when this Court, in *New York Times v. Sullivan*, held that a public official could not recover damages in a libel action without proving that a false statement was made with "actual malice"—"knowledge that it was false or reckless disregard of falsity." *See* 376 U.S. at 279–80. Comparing that standard to the "conditional privilege" afforded to public officials for misstatements made while performing official duties, the *New York Times* Court stressed that "critics of official conduct [should] have a fair equivalent of the immunity granted to the officials themselves." *Id.* at 282–83. As the Court observed, "'public men are, as it were, public property,'" and the speech at issue criticized a public official on a matter "relating to his official conduct." *Id.* at 268, 279 (*quoting Beauharnais v. Illinois*, 343 U.S. 250, 263–64 (1952)). Under these circumstances, the Court opined that "[a] rule compelling the critic of official conduct to guarantee the truth of all his factual assertions—and to do so on pain of libel judgments virtually unlimited in amount—leads to a comparable 'self-censorship.'" *Id.* at 279. Balancing the interests of public officials and the state against the interests of critics, the Court set forth a rule specifically designed to protect public debate concerning official conduct.

The Court engaged in a similar balancing test in *Gertz v. Robert Welch, Inc.*, and concluded that the *New York Times* "actual malice" standard does not apply in a defamation action where the plaintiff is a private individual. In reaching this conclusion, the *Gertz* Court noted that "some tension necessarily exists between the need for a vigorous and uninhibited press and the legitimate interest in redressing wrongful injury" and that it was necessary to strike the appropriate balance between the desire to provide "breathing space" for speech and the state's need to protect individuals' interests through tort law by reference to the status of the plaintiff as a public or private figure. 418 U.S. at 342–43. Ultimately, "the Court refuse[d] to provide, in [private figure] cases, the same level of constitutional protection that ha[d] been afforded the media in the context of defamation of public persons." *Id.* at 362.

In drawing the distinction between public and private figure plaintiffs, the Court highlighted that public figures had two principal advantages over private individuals. First, public figures have significantly greater access to the media and other channels of communication and, thus, a "more realistic opportunity to counteract false statements than private individuals normally enjoy." *Id.* at 344. Second, public officials and figures assume the risk of closer public scrutiny and invite attention and comment by their actions. *Id.* at 344–45. On the other hand, a private figure "has relinquished no part of his interest in the protection of his own good name, and consequently he has a more compelling call on the courts for redress of injury inflicted by defamatory falsehood." *Id.* at 345. As a result, the Court concluded that states should "retain substantial latitude in their efforts to enforce a legal remedy for defamatory falsehood injurious to the reputation of a private individual." *Id.*

In *Hustler Magazine, Inc. v. Falwell*, this Court's analysis shifted from the First Amendment implications of defamation claims to those of intentional infliction of emotional distress. *See* 485 U.S. at 50. The case arose when Hustler magazine published a lowbrow parody interview of Jerry Falwell in which he purportedly admitted to having had a drunken sexual encounter with his mother in an outhouse. *Id.* at 48. Falwell sued Hustler for, *inter alia*, intentional infliction of emotional distress, and the jury found for Falwell on this claim. *Id.* The Fourth Circuit affirmed, and this Court granted certiorari to determine "whether a public figure may recover damages for emotional harm caused by the publication of an ad parody offensive to him, and doubtless gross and repugnant in the eyes of most." *Id.* at 50. As in *New York Times*, the *Hustler* Court was required to balance the competing interests of persons who utter speech criticizing public figures with the state's interest in protecting its citizens from intentionally inflicted harm.

Chief Justice Rehnquist, speaking for the Court, began his analysis by opining on the primary purpose of protecting the freedom of speech: "At the heart of the First Amendment is the recognition of the fundamental importance of the free flow of ideas and opinions on matters of public interest and concern." *Id.* at 50–51. This purpose has special implications for public figures: "The sort of robust political debate encouraged by the First Amendment is bound to produce speech that is critical of those . . . public figures who are 'intimately involved in the resolution of important public questions or, by reason of their fame, shape events in areas of concern to society at large.'" *Id.* at 51 (*quoting Associated Press v. Walker, decided with Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 164 (1967) (Warren, C.J., concurring in result)). Moreover, some of this criticism may not be "reasoned or moderate." *Id.* The "caustic" or "unpleasantly sharp" nature of criticism, however, is a cost of entering public life, and those who enter the public arena must endure a certain amount of insult without judicial recourse. *See id.* at 51–52 ("[T]he candidate who vaunts his spotless record and sterling integrity cannot convincingly cry 'Foul!' when an opponent or an industrious reporter attempts to demonstrate the contrary.'" (*quoting Monitor Patriot Co. v. Roy*, 401 U.S. 265, 274 (1971))).

This does not mean "that *any* speech about a public figure is immune from sanction in the form of damages." *Id.* at 52. Traditional defamation may be penalized in some circumstances. Ultimately, however, the correct balance between speakers' rights and the rights of their public figure targets can be achieved only by applying the *New York Times* standard to claims for intentional infliction of emotional distress:

> Public figures and public officials may not recover for the tort of intentional infliction of emotional distress by reason of publications such as the one here at issue without showing in addition that the publication contains a false statement of fact which was made with 'actual malice,' i.e., with knowledge that the statement was false or with reckless disregard as to whether or not it was true.

Id. at 56. Without such heightened protection, Chief Justice Rehnquist reasoned, there is a significant danger that the media would engage in self-censorship for fear of tort claims by public figures. *Id.* at 52. Because the jury had found that the Hustler parody could not "reasonably be understood as describing actual facts about [Falwell] or actual events in which [he] participated," Falwell had failed to prove actual malice, and the Court granted judgment to Hustler on the intentional infliction of emotional distress claim. *Id.* at 57.

The *Hustler* Court grounded its opinion on the special status of those who intentionally enter the public arena. Since public figures have the capacity to "shape events," they must be willing to endure a certain level of harassment just as, in the defamation context, they must be willing to endure a certain amount of falsehood. This is precisely the rationale offered by the *Gertz* Court for providing greater protection to private figure plaintiffs. In a sense, then, *Hustler* is the mirror image of *Gertz*. While *Gertz* held that the *New York Times* "actual malice" standard did not apply to defamatory statements about private figures, *Hustler* recognized that public figures cannot avoid the "actual malice" standard merely by pleading causes of action other than defamation. Both opinions acknowledge that the states have a greater interest in protecting private figures from tortious conduct than they do in protecting public figures.

Two years after its *Hustler* decision, the Court was asked to determine whether it should recognize an "opinion" exception to the application of defamation laws. *See Milkovich*, 497 U.S. at 22. The underlying dispute arose when a high school wrestling coach sued a newspaper over an article implying that he had committed perjury. The newspaper maintained that its statements were absolutely protected as statements of opinion. *Id.* at 17–18.

The *Milkovich* Court began its analysis with an historical overview of defamation law and its interplay with the First Amendment. Citing *New York Times*, *Gertz*, and *Phila. Newspaper, Inc. v. Hepps*, 475 U.S. 767 (1986)—the last of which discussed the appropriate burden of proof in a defamation claim brought against a media defendant—the Court reviewed the differing concerns at stake when the target of defamatory speech is a public or private figure: "Public officials and public figures usually enjoy significantly greater access to the channels of effective communication and . . . have voluntarily exposed themselves to increased risk of injury from defamatory falsehood." *Milkovich*, 497 U.S. at 12–16 (*quoting Gertz*, 418 U.S. at 344–45). The Court noted that it had "also recognized constitutional limits on the *type* of speech which may be the subject of *state defamation actions*." *Id.* at 16 (emphasis added). For example, the use of the term "blackmail" could not be considered defamatory where the circumstances made clear that the term was being used merely as "rhetorical hyperbole, a vigorous epithet" to describe an individual's negotiating position as "extremely unreasonable." *Id.* at 16–17 (*citing Greenbelt Coop. Publ'g Assn., Inc. v. Bresler*, 398 U.S. 6 (1970)).[4] Likewise, courts confronted with First Amendment issues must "'make an independent examination of the whole record'" to ensure that "'the judgment does not constitute a forbidden intrusion on the field of free expression.'" *Id.* at 17 (*quoting Bose Corp. v. Consumers Union of U.S,, Inc.*, 466 U.S. 485 (1984)).

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[4] The Court also cited *Hustler* in this context for the proposition that the "First Amendment precluded recovery under state emotional distress parody which 'could not reasonably have been interpreted as stating actual facts about the *public figure* involved.'" *Milkovich*, 497 U.S. at 16–17 (*quoting Hustler*, 485 U.S. at 50) (emphasis added).

Given the "established safeguards" that it outlined, the Court opined that recognition of "still another First-Amendment-based protection for defamatory statements which are categorized as 'opinion' as opposed to 'fact'" was not only unnecessary, but also illogical: such an extension of First Amendment protection to "opinion" would "ignore the fact that expressions of 'opinion' may often imply an assertion of objective fact." *Id.* at 17–18. Once again, the Court held that it must "balance" the First Amendment's "vital guarantee of free and uninhibited discussion of public issues" against society's "pervasive and strong interest in preventing and redressing attacks upon reputation"—the latter of which, the Court noted, "reflects no more than our basic concept of the essential dignity and worth of every human being." *Id.* at 22 (internal quotation marks omitted). This balance is best achieved, the Court held, by refusing to take a categorical approach to speech under the First Amendment and, instead, by evaluating each allegedly defamatory statement under the standards set forth in *New York Times* and *Gertz*. *Id.* The Court held that the newspaper article's implication that the coach had committed perjury was sufficiently factual to be considered defamatory. *Id.* at 21–22.

Accordingly, far from creating an absolute tort exemption for "rhetorical hyperbole," the *Milkovich* Court explicitly refused to take a categorical approach, instead relying on the balancing test it had employed in the defamation context in several prior cases. *Milkovich* thus contradicts the proposition for which the Fourth Circuit cited it: rather than recognizing "a separate line of First Amendment precedent that is specifically concerned with the constitutional protections afforded to certain *types* of speech," the *Milkovich* Court held that each cause of action and each instance of potentially tortious speech requires an analysis of the competing interests at stake.

Moreover, though the *Milkovich* Court required that an "opinion" imply "an assertion of objective fact" to qualify as defamation, its holding did not extend absolute First Amendment protection to all "rhetorical hyperbole" regardless of the cause of action. *Milkovich* did not involve a private figure's intentional infliction of emotional distress claim. Indeed, *Milkovich* merely applied the *New York Times* and *Gertz* standards to the defamation claim before the Court. Neither *Hustler* nor *Milkovich* addressed the question as framed by the Fourth Circuit here: whether a speaker engaged in "rhetorical hyperbole" is immune from any tort liability, regardless of the target of his or her speech. Such an extension of First Amendment protection is unnecessary and unwarranted.

A number of state courts have already reached this conclusion. For example, in *State v. Carpenter*, the Alaska Supreme Court permitted an intentional infliction of emotional distress claim to proceed against a radio host who had made targeted public statements towards a private individual. *See Carpenter*, 171 P.3d 41, 56 (Alaska 2007). The plaintiff had written a letter to a local station complaining about the host of a national radio show, and the host read the letter on the air while making "derogatory and sexually explicit remarks about [the plaintiff] and making other comments that allegedly inflamed listeners and encouraged them to contact or confront [her]." *Id.* at 47. Because the statements were "hyperbole, used only for shock value and d[id] not state or imply any factual basis," the Court recognized that they were not capable of defamatory meaning. *Id.* at 51 (noting that defamation requires a "false and defamatory statement"). Nonetheless, the Court permitted the emotional distress claim to proceed because it was "not based on the truth or falsity of [the speech] and [was] not based on harm to her reputational interest." *Id.* at 56. Rather, although both the defamation and intentional infliction claims "arose out of words [the host] allegedly spoke . . . the essence of the viable part of the [intentional infliction of emotional distress] claim was the alleged outrageousness of his conduct in provoking his listeners and inviting them . . . to harass [the plaintiff] and, with him, make her life a 'living hell.'" *Id.* at 57. Moreover, the Court specifically distinguished *Hustler*, noting that, while "the First Amendment affords heightened protection to speech in the 'area of public debate *about* public figures,' . . . [h]eightened First Amendment protection does not extend to intentional infliction of emotional distress claims based on speech that is not *about* a public figure or *about* a matter of public concern." *Id.* at 56 (*citing Hustler*, 485 U.S. at 53); *see also Esposito-Hilder v. SFX Broad., Inc.*, 654 N.Y.S.2d 259, 263–64 (N.Y. Sup. Ct. 1996) (permitting intentional infliction of emotional distress claim to proceed against radio program that nominated local woman for its "ugliest bride" contest and observing that "[t]he First Amendment was not enacted to enable wolves to parade around in sheep's clothing, feasting upon the character, reputation and sensibilities of innocent private persons").

Other courts have recognized that *Hustler* does not extend to speech targeting private figures even where the subject matter of the speech is of public concern. In *Van Duyn v. Smith*, for example, the Illinois Court of Appeals declined to extend *Hustler* where anti-abortion activists created "Wanted" posters naming the executive director of a local clinic and distributed them along with a "Face the American Holocaust" poster to the plaintiff's neighbors. 527 N.E.2d 1005, 1007–11 (Ill. App. 1988). As in *Carpenter*, the *Van Duyn* Court dismissed the plaintiff's defamation claim on the ground that the posters were comprised solely of hyperbole. *Id.* at 1014 (noting that "'[u]nder the First Amendment there is no such thing as a false idea'" (*quoting Gertz*, 418 U.S. at 339–40 (1974))). Nevertheless, the Court permitted the director's intentional infliction of emotional distress claim to proceed, explaining that the *Hustler* Court's "primary concern was with public officials and public figures." *Id.* at 1010–11; *see also Delfino v. Agilent Techs., Inc.*, 52 Cal. Rptr. 3d 376, 393 n.26 (Cal. App. 2007) (distinguishing *Hustler* on the ground that, "[h]ere, plaintiffs were not public officials or public figures, did not sue for defamation, and, in pleading the intentional and negligent infliction claims, were not attempting to plead an otherwise defective defamation claim").

The distinction drawn by these courts between the interests of public and private individuals makes sense given the rationales offered by this Court in its First

Amendment jurisprudence. The State of Maryland had a particularly strong interest in protecting Mr. Snyder from the Phelpses' expressive conduct by providing tort remedies for intentional infliction of emotional distress and invasion of privacy. Mr. Snyder was simply a private citizen attempting to attend his son's funeral without disruption. He took no action to inject himself into a public debate over the rights of homosexuals in the United States. He did not run for public office and did nothing to obtain the status of a celebrity or a public figure. Indeed, any publicity he may have received resulted solely from the Phelpses' decision to target Matthew Snyder's funeral. As this Court has explained, tortfeasors "cannot, by their own conduct, create their own defense by making the claimant a public figure." *See Hutchinson v. Proxmire*, 443 U.S. 111, 135 (1979). Where, as here, a private figure has not linked himself to an issue of public concern and is, instead, engaged in the private religious act of mourning, the state's interest in protecting the private figure should outweigh an attacker's First Amendment right to publicly hurl epithets in his direction. Accordingly, the Court should reject the Fourth Circuit's attempt to extend absolute First Amendment protection to expressive conduct targeted at private figure plaintiffs.

B. The Phelpses' Expressive Conduct Did Not Relate to "Matters of Public Concern" Such that it Warranted Heightened First Amendment Protection.

As this Court observed in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, "[i]t is speech on 'matters of public concern' that is 'at the heart of the First Amendment's protection.'" 472 U.S. at 758–59 (*quoting First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 776 (1978)). In contrast, in matters of purely private concern, "'[t]here is no threat to the free and robust debate of public issues; there is no potential interference with a meaningful dialogue of ideas concerning self-government; and there is no threat of liability causing a reaction of self-censorship by the press.'" *Id.* at 760 (*quoting Harley-Davidson Motorsports, Inc. v. Markley*, 568 P.2d 1359, 1363 (Or. 1977)). The Fourth Circuit purported to examine the "content, form, and context" of the Phelpses' speech, "as revealed by the whole record," to determine whether it involved a matter of public concern. *Snyder*, 580 F.3d at 220. It erred, however, in answering this question in the affirmative.

The Fourth Circuit made a "public concern" finding only with respect to a small portion of the signs the Phelpses carried at their protest: "America is Doomed," "God hates the USA/Thank God for 9/11," "Pope in Hell," "Fag Troops," "Semper Fi Fags," "Thank God for Dead Soldiers," "Don't Pray for the USA," "Thank God for IEDs," "Priests Rape Boys," and "God Hates Fags." *See id.* at 222. Concluding that these signs involved matters of public concern, "including the issue of homosexuals in the military, the sex abuse scandal within the Catholic Church, and the political and moral conduct of the United States and its citizens," the Court unilaterally adopted the Phelpses' interpretation instead of analyzing each statement on its own merits. *Id.* The evidence at trial, however, established that the Phelpses began protesting military funerals shortly after members of the WBC allegedly were accosted by Marines. This timeline suggests that the Phelpses' signs were *not* about the purported matters of public concern cited by the Fourth Circuit but were, instead, what they appeared to be at first glance: intentionally harmful epithets hurled at Mr. Snyder and his family in retaliation for this prior, unrelated physical assault.[5] While purporting to examine the context of the Phelpses' speech, the Court performed a decidedly selective analysis.

The Court declined to analyze whether the Phelpses' numerous other signs, including those saying, "You're Going to Hell" and "God Hates You," raised a matter of public concern, despite acknowledging that the signs could reasonably be interpreted as targeted specifically at Mr. Snyder. *See id.* at 224. Instead, the Court concluded that these signs were absolutely protected under the First Amendment because "no reasonable reader would understand those statements . . . to assert provable facts" about Mr. Snyder or his son. *Id.* As set forth above, this holding misapplied *Milkovich*, which, on its face, relates only to defamation claims. The Court also erred by applying this categorical rule without first determining whether the signs related to a matter of public concern.

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[5] Likewise, in Respondents' Brief in Opposition to Petition for Writ of Certiorari, the Phelpses assert that the "Matt in Hell" sign they created refers to Matthew Shepard—a young, homosexual man beaten to death in 1998—rather than Matthew Snyder. *See* Resp. Br. in Opp. to Pet. for Writ of Cert. at 1–2. Though the Phelpses insist that "[e]veryone in the case is well aware what Matt in Hell is about," they fail to explain how Mr. Snyder—or, indeed, anyone not already familiar with the Phelpses' mission and practices—was supposed to understand that "Matt in Hell" does not refer to Matthew Snyder.

The Fourth Circuit likewise erred in concluding that the Epic was absolutely protected by the First Amendment. The Court acknowledged that the Epic personally targeted the Snyders by stating, among other things, that "Albert and Julie Snyder" had "taught Matthew to defy his Creator, to divorce, and to commit adultery." Nevertheless, the Court once again misapplied *Milkovich* and concluded that the Epic would be understood by a reasonable reader as containing rhetorical hyperbole and not actual facts. *Id.* at 224. Despite the fact that the Epic referred to the Snyder family by name, the Court opined that the Epic could not be "divorced from the general context of the funeral protest" and was "primarily concerned with the Defendants' strongly held views on matters of public concern." *Id.* at 225. But the issue of whether the Snyders raised their deceased son "to commit adultery"—which, itself, is a false statement of fact—bears no relationship to the so-called "public concern" issues cited by the Fourth Circuit. The Phelpses should not be permitted to gain First Amendment protection for specifically targeted falsehoods about Mr. Snyder and his family by camouflaging them with more general statements purportedly involving matters of public concern.

Indeed, the Fourth Circuit appears to have recognized that much of the Phelpses' expressive conduct did not relate to matters of public concern but was, instead, "intended to spark debate about issues with which the *Defendants* are concerned." *Id.* at 223 (emphasis added). No Court, however, has held that defendants can create a matter of public concern simply by protesting about it, and the Fourth Circuit erred by holding otherwise. *Cf. Waldbaum v. Fairchild Publ'ns*, 627 F.2d 1287, 1296 (D.C. Cir. 1980) ("[E]ssentially private concerns or disagreements do not become public controversies simply because they attract attention. Rather, a public controversy is a dispute that in fact has received public attention because its ramifications will be felt by persons who are not direct participants." (*citing Time, Inc. v. Firestone*, 424 U.S. 448, 454–55 (1976))).

C. The Phelpses' Unilateral Association of Purportedly "Public" Issues With Matthew Snyder's Funeral Should Not Have Immunized Their Tortious Conduct.

Implicit in this Court's First Amendment jurisprudence is a requirement not only that protected speech relate to a public controversy, but also that the target of the harmful speech have some reasonable relationship to that controversy. When a plaintiff brings a defamation claim, for example, part of the "public figure" analysis requires a determination that the plaintiffs have "thrust themselves to the forefront" of a public controversy so as to influence its resolution. *See Gertz*, 418 U.S. at 345. Even where speech centers on a matter of public concern, the speaker cannot harass a private individual who has no connection to that issue and hope to gain absolute constitutional protection for the harassment. By extending such protection to the Phelpses' intentionally harmful conduct, the Fourth Circuit ignored this principle and essentially immunized the Phelpses from liability without analyzing whether Matthew Snyder's funeral bore any logical connection to the Phelpses' allegedly "public" issues.

Even those few courts that have extended *Hustler* to speech targeting private individuals have done so only in the context of a debate with which the victim was already associated. For example, in *Deupree v. Iliff*, a local radio host aired a debate about sex education during which a local attorney claimed that the plaintiff, a sex education teacher, "derives probably a very secret sort of sexual gratification" from teaching the subject area. 860 F.2d 300, 302–03 (8th Cir. 1988). The teacher sued the attorney for defamation and intentional infliction of emotional distress, and the Eighth Circuit held that the attorney's statement was merely one of opinion and was, thus, "absolutely protected under the first amendment." *Id.* at 304 (internal citation and alterations omitted).[6] Essential to the Court's analysis, however, was the fact that the radio program centered on the teacher's sexual education course, which was a matter of concern to the local community. The Court specifically noted that the program "served as a broad-faced forum for opinions on the appropriateness of sex education in schools generally as well as a forum for the specific discussion of a controversial sex education course in a local public school." *Id.* In discussing *Hustler*, the Court explained that, "'in areas of public debate,' First Amendment principles must operate to limit 'a State's authority to protect its citizens from the intentional infliction of emotional distress.'" *Id.* (*quoting Hustler*, 485 U.S. at 50). Deupree was at the center of a local public controversy whether or not she qualified as a "public figure."

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[6] To the extent that the *Deupree* Court was recognizing an "opinion" privilege under the First Amendment, *Milkovich* Court explicitly overruled its holding. *See Milkovich*, 497 U.S. at 18.

Here, Snyder and his family have no rational connection to the public issues cited by the Fourth Circuit. Matthew was not homosexual, though many who heard and read the Phelpses' speech likely thought he was. Except for the fact that they were Catholics, the Snyder family had no connection to the sex-abuse scandal within the Catholic Church. As acknowledged by the Fourth Circuit, the Phelpses used Mr. Snyder's name, his personal details, and his son's funeral as a platform to bring their message to a broader audience. Outrageous, intentionally harmful personal attacks should not gain absolute First Amendment protection merely because they are hurled in conjunction with speech concerning matters that are arguably of public concern. *Cf. Wolston v. Reader's Digest Ass'n, Inc.*, 443 U.S. 157, 167 (1979) ("A private individual is not automatically transformed into a public figure just by becoming involved in or associated with a matter that attracts public attention."). By the same token, even matters of "public concern" lose some of their protection when interjected into the context of a private funeral. The Fourth Circuit erred in holding otherwise.

II. Mr. Snyder Should Not Have to Prove that the Speech Associated with the Phelpses' Tortious Conduct Could "Reasonably Be Interpreted as Stating Actual Facts" to Sustain an Intentional Infliction of Emotional Distress Claim.

With minimal discussion of the underlying tort claims, the Fourth Circuit created a rule requiring a private figure plaintiff seeking to recover for intentional infliction of emotional distress based on expressive conduct to prove that the speech involved could "reasonably be read to state actual facts," as purportedly mandated by *Milkovich*. The Court ignored that *Milkovich*, as well as the *New York Times* standard it applied, arose out of defamation law. The torts of defamation and intentional infliction of emotional distress implicate distinct state and personal interests, and the Fourth Circuit erred in simply applying the rules of one tort to the other.

The states recognize the tort of defamation to provide their citizens with the means to protect their reputations from the damage caused by false statements. At common law, statements defaming a person are presumably false, but the publisher of those statements has an absolute defense if he can prove that the statements are true. The truth or falsity of the statement therefore determines the viability of a defamation claim. On the other hand, to recover for intentional infliction of emotional distress based on expressive conduct, a plaintiff must establish that the conduct was intended to inflict emotional distress, was outrageous, and did, in fact, inflict serious emotional distress. The cause of action *does not* depend on whether the speech involved in the tortious conduct is fact or opinion or whether it is true or false.

With these principles in mind, this Court developed the *New York Times* and *Gertz* standards as a means of protecting certain speakers and speech from defamation claims. By injecting the requirement that the plaintiff prove falsity, the *New York Times* Court reversed the common law presumption. The plaintiff must dispense with the absolute defense—the truth of the statement—before his claim can proceed. Conversely, the speaker can engage in the type of speech to which the standard applies without fear of having to prove that his statements are true to avoid liability. Even with heightened protection, however, the tort of defamation still protects individuals from the same reputational hazards: a plaintiff may recover for false statements that damage his reputation so long as he meets the level of fault based on his status as a public or private figure.

Plugging these standards into the intentional infliction of emotional distress tort does not merely create heightened protection for certain speakers; indeed, it changes the very nature and scope of the remedy. When the element of falsity is added to an intentional infliction of emotional distress claim, the plaintiff loses protection from entire categories of expressive conduct. The plaintiff may recover for emotional distress caused by outrageous speech that includes false statements, but he may not recover for the same degree of emotional distress caused by outrageous and intentionally harmful statements that are not capable of being proven true or false.

Consequently, the speaker can ensure constitutional immunity from liability by uttering statements that are so outrageous that they "fail to contain a provably false factual connotation." In effect, the element of outrageousness—the very threshold separating actionable from non-actionable conduct under the common law—becomes an affirmative defense to the claim.

The *Hustler* Court recognized the difference between the torts of defamation and intentional infliction of emotional distress and, nevertheless, deemed it necessary to apply the *New York Times* standard to an emotional distress claim involving a public figure. Several factors not present here, however, guided the *Hustler* Court. First, as noted above, the Court repeatedly stressed the need to protect public debate concerning public officials. The Court was not blind to the interests of public officials in protecting themselves from emotional harm caused by speech, but it applied the heightened standard after noting that public figures assume the risk of emotional distress when they enter the public sphere. *Hustler*, 485 U.S. at 51–52. Second, Falwell's emotional distress claim essentially duplicated his defamation claim, and the Court recognized that Falwell was primarily concerned with "reputational" harm. Third, the Court was apprehensive that the common law element of outrageousness did not provide an adequate means for a jury to distinguish satire, which warrants constitutional protection because of its inherent value in political discourse, from speech of limited value. On balance, the Court felt that it was necessary to provide heightened protection to satirical statements to avoid chilling public debate.

In contrast to the careful analysis performed by the *Hustler* Court before it imported the *New York Times* standard from the defamation context, the Fourth Circuit here granted absolute protection to the Phelpses' expressive conduct without giving due consideration to the specific factors at play and the potential repercussions for intentional infliction of emotional distress claims. First, as noted previously, Mr. Snyder is a private individual who did not voluntarily inject himself into the public sphere. The state's interest in protecting Mr. Snyder from the emotional distress caused by the Phelpses' expressive conduct is therefore necessarily greater. Second, Mr. Snyder's claim for intentional infliction of emotional distress is distinct from any claim he may have had for defamation. Mr. Snyder had a clear interest in avoiding the unwarranted intrusion upon his son's funeral and the resulting emotional distress. He had only one opportunity to attend the event. Any damage to Mr. Snyder's reputation caused by the Phelpses' protest is unrelated to these concerns. Third, the common law outrageousness element of intentional infliction of emotional distress provides juries with an adequate means of distinguishing actionable conduct from protected speech. Here, the Phelpses' conduct was outrageous not only because of the words they chose but because they came uninvited to Matthew's funeral with the intention of disrupting the religious ritual.

Perhaps most notably, the Fourth Circuit failed to account for the repercussions of the rule it adopted. When the Fourth Circuit misapplied *Hustler* and *Milkovich* to grant heightened protection to the Phelpses' speech, it eliminated entirely Mr. Snyder's emotional distress remedy and the remedies of other private individuals intentionally harmed by expressive conduct. Indeed, the Fourth Circuit's rule encourages parties to include outrageous speech in their disruptive activities because conduct associated with outrageous speech that cannot "reasonably be read to state actual facts" is given categorical protection. Since protesting Matthew Snyder's funeral, the Phelpses have threatened to protest the funerals of massacred Amish children in Pennsylvania and murdered students at Virginia Tech. Under the Fourth Circuit's holding, the victims of such torment have no remedy. This Court should be wary of such a rule.

III. As a Member of a Captive Audience at his Son's Funeral, Mr. Snyder Should Not Have Been Barred from Seeking a Remedy for the Intentional Invasion of his Privacy.

This Court has recognized that, in certain settings, regardless of the content of the speech associated with a protest, the privacy interests of an individual exceed the First Amendment rights of the protestors. Under the "captive audience" doctrine, the First Amendment rights of a speaker may be curtailed when the listener's constitutional right to privacy justifies protection from the unwanted messages. As set forth above, the Fourth Circuit erred by immunizing the Phelpses from liability due to the type and nature of their speech. Even assuming, *arguendo*, that the Phelpses' *speech alone* would be entitled to First Amendment protection in other circumstances, Mr. Snyder is entitled to governmental protection from the Phelpses' conduct because he was a captive audience at his son's funeral.

Application of the captive audience doctrine depends principally on two factors: whether a sufficient privacy interest of the listener is at stake to warrant protection and whether the speaker's conduct interferes with the listener's privacy in an intolerable manner. *See McQueary v. Stumbo*, 453 F. Supp. 2d 975, 990 (E.D. Ky. 2006). The doctrine is applicable to funeral picketing because the government has an interest in protecting the substantial privacy interests of mourners at funerals and memorial services. Funeral picketing is also subject to the captive audience doctrine because targeted protesting of private funerals amounts to an intolerable interference with the privacy interests of grieving friends and, especially, the decedent's family.

A. Substantial Privacy Interests are at Stake for Mourners at Funerals and Memorial Services.

The Court has noted that the "recognizable privacy interest in avoiding unwanted communications varies widely in different settings. It is far less important when 'strolling through Central Park' than when 'in the confines of one's own home,' or when persons are 'powerless to avoid' it.'" *Hill v. Colorado*, 530 U.S. 703, 716 (2000) (*quoting Cohen v. California*, 403 U.S. 15, 21–22 (1971)). The funeral service in this case was a private gathering and was not held in the type of public forum that would permit the Phelpses to claim that their right to speak there was constitutionally protected. Although the Phelpses separated themselves from the funeral service, they directed their hateful remarks at the funeral audience, making it impossible for Mr. Snyder to bury his son in peace.

This Court has recognized several contexts in which an unwilling listener is a "captive audience." The Court has not hesitated to protect individuals within their own homes from targeted protests. *See Frisby v. Schultz*, 487 U.S. 474, 484–85 (1988). In *Frisby*, the Court upheld a municipal ordinance that restricted residential picketing. The ordinance at issue created a blanket ban on picketing "before or about" any residence, including public streets outside of a residence. *Id.* at 476. The Court had no trouble recognizing the "significant government interest" of "the protection of residential privacy." *Id.* at 484.

Although the *Frisby* Court stressed the uniqueness of the home as a refuge, *see id.*, its rationale for upholding the picketing restriction was more complex. The *Frisby* Court explained that the interest in protecting individuals from unwanted speech in their homes stems from their inability to avoid it:

> One important aspect of residential privacy is protection of the unwilling listener. Although in many locations, we expect individuals simply to avoid speech they do not want to hear, the home is different. That we are often captives outside the sanctuary of the home and subject to objectionable speech does not mean we must be captives everywhere. Instead, a special benefit of the privacy all citizens enjoy within their own walls, which the State may legislate to protect, is an ability to avoid intrusions.

Id. at 484–85 (citations, quotation marks, and alterations omitted). On this basis, the Court concluded that "[t]here simply is no right to force speech into the home of an unwilling listener." *Id.* at 485.

Subsequently, the Court recognized that an individual can be a captive audience to unwanted speech outside of his home. In *Hill v. Colorado*, the Court was asked to determine the constitutionality of a statute that prohibited persons from knowingly approaching within eight feet of an individual who was within 100 feet of a health care facility entrance, for purposes of displaying signs, engaging in oral protests, education, counseling, or passing leaflets or handbills, without the individual's consent. 530 U.S. at 707. The Court upheld the statute after concluding that it served the "significant and legitimate" governmental interests of providing "unimpeded access to health care facilities and the avoidance of potential trauma to patients associated with confrontational protests." *Id.* at 715. The Court observed that individuals entering health care facilities "are often in particularly vulnerable physical and emotional conditions." *Id.* at 729. Further, the Court stressed that such individuals "may be under special physical or emotional stress," *id.*, and could "potential[ly] [suffer] physical and emotional harm when an unwelcome individual delivers a message (whatever its content) by physically approaching . . . at close range," *id.* at 718 n.25; *see also Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 768 (1994) (recognizing a significant governmental interest in protecting the "medical privacy" and the "psychological" and "physical well-being of the patient held 'captive' by medical circumstance").

In analyzing the privacy interest protected by the regulation, the *Hill* Court emphasized the "importan[ce of] conducting this interest analysis to recognize the significant difference between state restrictions on a speaker's right to address a willing audience and those that protect listeners from unwanted communication." *Hill*, 530 U.S. at 715–16. The Court also cited ***Frisby*** for the proposition that "the protection afforded to offensive messages does not always embrace offensive speech that is so intrusive that the unwilling audience cannot avoid it." *Id.* at 716 (*citing Frisby*, 487 U.S. at 487). Continuing, the Court noted that "it may not be the content of the speech, as much as the deliberate verbal or visual assault, that justifies proscription." *Id.* at 716 (quotation marks and alteration omitted).

The *Hill* Court also explained the situations in which a listener could be "captive" and, therefore, protected from unwanted speech of any character. The Court noted that it has recognized "the interests of unwilling listeners in situations where 'the degree of captivity makes it impractical for the unwilling viewer or auditor to avoid exposure.'" *Id.* at 718 (*quoting Erznoznik v. City of Jacksonville*, 422 U.S. 205, 209 (1975)). Further, the Court explained that an individual's privacy interest in avoiding unwelcome speech was paramount in the individual's home but that the right "can also be protected in confrontational settings." *Id.* at 717.

This Court has not considered whether an individual attending a family member's funeral has a privacy interest that warrants protection from unwanted speech. The Court has, however, explicitly recognized the privacy interest of family members of the deceased in other contexts. In *National Archives & Records Administration v. Favish*, 541 U.S. 157 (2003), this Court was asked to determine whether a media group was entitled to obtain an individual's death scene photographs through a Freedom of Information Act ("FOIA") request. *Id.* at 161. Specifically, the Court interpreted an exemption within the FOIA for documents compiled for law enforcement purposes whose production "could reasonably be expected to constitute an unwarranted invasion of privacy." *Id.* at 160–61. After considering the importance of the family members' privacy interest in preventing broad exposure of the photographs, the Court held that the privacy interest outweighed any public interest in disclosure. *Id.* at 170.

In determining the extent of the family members' privacy interest in the death images, the *Favish* Court considered the significance of cultural traditions and common law protections applicable to death and burials:

> Burial rites or their counterparts have been respected in almost all civilizations from time immemorial. . . . They are a sign of the respect a society shows for the deceased and for the surviving family members. The power of Sophocles' story in Antigone maintains its hold to this day because of the universal acceptance of the heroine's right to insist on respect for the body of her brother.

Id. at 167–68 (citations omitted). Further, the Court explained the effect that unwanted public intrusion could have on the mourning process of surviving family members:

> The outrage at seeing the bodies of American soldiers mutilated and dragged through the streets is but a modern instance of the same understanding of the interests decent people have for those whom they have lost. Family members have a personal stake in honoring and mourning their dead and objecting to unwarranted public exploitation that, by intruding upon their own grief, tends to degrade the rites and respect they seek to accord to the deceased person who was once their own.

Id. at 168. The Court emphasized that, in addition to the "well-established cultural tradition acknowledging a family's control over the body and death images of the deceased," the common law recognized a survivor's right to privacy in protecting the memory of the deceased:

> It is the right of privacy of the living which it is sought to enforce here. That right may in some cases be itself violated by improperly interfering with the character or memory of a deceased relative, but it is the right of the living, and not that of the dead, which is recognized. A privilege may be given the surviving relatives of a deceased person to protect his memory, but the privilege exists for the benefit of the living, to protect their

> feelings, and to prevent a violation of their own rights in the character and memory of the deceased.

Id. at 168–69 (*quoting Schuyler v. Curtis*, 42 N.E.22, 25 (N.Y. 1895)). Against this backdrop, the Court held that the FOIA "recognizes surviving family members' right to personal privacy with respect to their close relative's death-scene images" because "the statutory privacy right protected by Exemption 7(C) goes beyond the common law and the Constitution" and "[i]t would be anomalous to hold in the instant case that the statute provides even less protection than does the common law." *Id.* at 170.

In *Phelps-Roper v. Strickland*, 539 F.3d 356 (6th Cir. 2008), the Phelpses challenged an Ohio statute that placed time, place, and manner restrictions on protest activities during or shortly after funeral processions. The Sixth Circuit held that the statute served a significant governmental interest in protecting the citizens of Ohio from disruption during events associated with funerals. *Id.* at 362. In reaching this conclusion, the Court first framed the analysis as requiring "an appropriate balance between the First Amendment rights of Phelps-Roper and the interests of funeral attendees." *Id.* The Court was quick to point out that, although the messages conveyed by the Phelpses were "widely offensive to many," their First Amendment protection was not thereby lost. *Id.* Next, citing *Hill* and *Frisby*, the Court outlined the captive audience doctrine and the situations where it previously had been applied. The Court observed that "[i]ndividuals mourning the loss of a loved one share a privacy right similar to individuals in their homes or individuals entering a medical facility." *Id.* at 364–65. Moreover, the Court explained that the "concerns for a survivor's rights articulated in *Favish* are perhaps even greater in the context of a funeral or burial service." *Id.* at 366. Mourners cannot simply turn their heads to avoid protests without sacrificing their right to partake in the funeral service. *Id.* The Court also rejected the Phelpses' contention that funeral attendees can avoid the unwanted speech by not attending the funeral. As the Court explained, given the interests at stake, "a funeral or burial service cannot be dismissed as nothing more than a 'voluntary' activity." *Id.* The Court concluded that the state had an important interest in protecting funeral attendees because the family members of a deceased person have a privacy right in the character and memory of the deceased. *Id.* The Court ultimately held that the statute at issue was a reasonable time, place, and manner restriction that did not violate the First Amendment. *Id.* at 372.

Mr. Snyder had a privacy interest in attending his son's funeral without disruption by unwanted protests. Mr. Snyder had only one opportunity to attend his son's funeral. He could not avoid the Phelpses' speech without avoiding the funeral altogether. Although Mr. Snyder was not confined in the strict sense, this Court has recognized that a listener can be captive in confrontational settings outside of the home. Furthermore, Mr. Snyder was in a particularly vulnerable condition at the time he was confronted with the Phelpses' speech due to the emotions he felt in connection with the death of his son.

B. The Phelpses' Conduct Interfered with Mr. Snyder's Privacy Interest in an Intolerable Manner.

Given the substantial privacy interest in the context of funerals and memorial services, the next question is whether the Phelpses' conduct interfered with Mr. Snyder's interest in an intolerable manner. Answering this question requires analysis of the facts surrounding the Phelpses' protest to determine if it created a "confrontational setting," as described in *Hill*, such that the speech could be proscribed through the tort system.

The Phelpses' protest was a well-planned event. As noted above, to gain maximum exposure, the Phelpses placed themselves at the main entrance of St. John's Catholic Church property where Matthew Snyder's funeral was to occur. Matthew's funeral procession had to be re-directed to a service entrance to lessen the protest's impact on mourners. Despite this precaution, the Phelpses were a mere 200–300 feet from Mr. Snyder and the other funeral attendees during the procession. Even the Phelpses' own expert acknowledged that their actions had a serious impact on Mr. Snyder's grieving process. (Vol. X at 2578.) Moreover, the Phelpses' expert acknowledged that some of their signs went "further than protesting against a war." (Vol. X at 2572.) Thus, it was essentially undisputed at trial that the Phelpses had intentionally interfered with Mr. Snyder's grieving process in an intolerable manner.

By protesting Matthew Snyder's funeral, the Phelpses targeted a captive audience. Matthew's family members could not avoid the Phelpses' unwanted expressive conduct without avoiding the funeral altogether. Such measures are not required in light of the special interest family members have in mourning their deceased relatives. Because he was unable to avoid the Phelpses' harmful expressive conduct, Mr. Snyder was entitled to greater protection from it than may have been warranted in other circumstances. Consequently, the Fourth Circuit erred by immunizing the Phelpses from liability without considering Mr. Snyder's special status as a captive audience.

IV. Mr. Snyder's First Amendment Rights to Free Exercise and Peaceable Assembly Should Outweigh the Phelpses' First Amendment Right to Target Hateful Speech at Him During His Son's Funeral.

Even the Phelpses do not genuinely dispute that, by targeting their protests at Mr. Snyder, they disrupted his peaceful assembly and mourning process. As a consequence, when the Fourth Circuit immunized the Phelpses from liability, it necessarily chose to subordinate Mr. Snyder's First Amendment rights of free exercise and peaceful assembly to the Phelpses' free speech rights. Such a wholesale promotion of the free speech rights of one party without accounting for the free exercise and peaceful assembly rights of another has no support in the Constitution.

The party against whom civil damages are sought should not be able to engage in actions that infringe constitutionally protected rights while, at the same time, cloaking such actions with the impregnability afforded by other constitutional rights. To quote Justice Holmes, "the right to swing [one's] fist ends where the other man's nose begins." Justice Holmes' notion of balancing freedoms is instructive. One's right or freedom ends where it conflicts with or infringes the right or freedom of another.

In this case, the Phelpses' conduct interfered with the Snyders' right to bury their son, a religious ceremony entitled to constitutional protection through the First Amendment's Free Exercise Clause. *See Employment Div., Dep't of Human Res. of Oregon v. Smith*, 494 U.S. 872, 877 (1990) (holding that First Amendment's protection of "exercise of religion" extends "not only [to] belief and profession but [also to] the performance of (or abstention from) physical acts," including, *inter alia*, assembling with others for worship service and participating in sacramental rituals). Likewise, attendance at a funeral service implicates the First Amendment right to peaceably assemble: the assembly of fellow believers at a funeral service provides support and a sense of historical continuity with past participants in the same ritual, reinforcing the members' commitments to their collective faith. *See* Comment, *Zoning Ordinances Affecting Churches: A Proposal for Expanded Free Exercise Protection*, 132 U. Pa. L. Rev. 1131, 1150 (1984) ("A religious group is more than the sum of its individual believers: the assembly of its members is essential to the creation of a unified community with a shared spiritual life and common goals.").

The Phelpses have argued, and the Fourth Circuit held, that the District Court's failure to direct a verdict in their favor violated their First Amendment free speech rights. By the same token, however, the Fourth Circuit's decision to direct a verdict for the Phelpses on First Amendment grounds constitutes government action that adversely affects Mr. Snyder's First Amendment rights to free exercise and freedom of assembly. By immunizing obtrusive conduct under the guise of free speech, the Fourth Circuit's rule would allow uninvited, antagonistic individuals to infringe another citizen's constitutionally protected freedoms and leave the victim with no legal recourse.

Rather than simply elevating the Phelpses' free speech rights by granting absolute protection to their expressive conduct, the Court was required to balance those rights against Mr. Snyder's right to free exercise and assembly. This Court's treatment of the privacy interest is instructive on this point. As discussed above, where a person's free speech rights are infringing another's privacy rights, the Court has allowed those speech rights to be curtailed "dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner." *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 209, (1975) (*quoting Cohen v. California*, 403 U.S. 15, 21 (1971)); *see also Hill v. Colorado*, 530 U.S. 703, 716 (2000). The case for protecting an individual's rights to exercise his religion and to peacefully assemble at a funeral service is even stronger. Indeed, the Founders chose to place these rights on equal footing with the right to free speech by listing all three protections in the First Amendment.

By choosing St. John's Catholic Church for Matthew's memorial service, Mr. Snyder was attempting to practice religion on his own terms. Members of the Snyder family had only one opportunity to assemble and support one another during Matthew's funeral service. On the other hand, the Phelpses could have presented their message in a setting that did not affect Mr. Snyder's ability to practice his religion or to enjoy the support of his family members during a highly emotional event. Instead, they intentionally used the funeral as a platform for their message. As "the right to swing [one's] fist ends where the other man's nose begins," the constitutional protection of the Phelpses' speech should have ended at the point where it prevented Mr. Snyder from attending his son's funeral on terms that he chose.

CONCLUSION

For the reasons stated above, this Court should reverse the judgment of the Fourth Circuit.

Respectfully submitted,

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RESPONDENT'S BRIEF

No. 09-751

Supreme Court, U.S.
FILED
JUL 7 - 2010
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In The
Supreme Court of the United States

◆

ALBERT SNYDER,

Petitioner,

v.

FRED W. PHELPS, SR.; SHIRLEY L. PHELPS-ROPER;
REBEKAH A. PHELPS-DAVIS; and
WESTBORO BAPTIST CHURCH, INC.,

Respondents.

◆

On Writ Of Certiorari To The
United States Court Of Appeals
For The Fourth Circuit

◆

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QUESTIONS PRESENTED

1. Whether Petitioner's claim for intentional infliction of emotional distress must fail because it is based on speech by Westboro Baptist Church that was on public issues, and was not false statements of fact (and because Petitioner is not a private figure).

2. Whether Petitioner's claim for intentional infliction of emotional distress must fail because WBC's loose, figurative, hyperbolic speech, which no reasonable reader could interpret as stating actual facts, is public-issue speech (and because Petitioner is not a private figure).

3. Whether Petitioner's invasion of privacy claim must fail because he was not a member of a captive audience, and even if he was, Westboro Baptist Church's speech occurred well outside any zone of privacy the Court might ever recognize in a public funeral.

4. Whether Petitioner's invasion of privacy claim must fail because Westboro Baptist Church did not interfere with or disrupt the public funeral of his son, so it is not necessary to weigh Westboro Baptist Church's right to engage in religious speech on public right-of-ways against any privacy right the Court might find in a public funeral.

RULE 29.6 STATEMENT

Westboro Baptist Church, Inc. does not have a parent corporation and no publicly held company owns 10% or more of its stock (it has no stock).

PARTIES TO THE PROCEEDING

The parties to the proceeding in the United States Court of Appeals for the Fourth Circuit were Albert Snyder, Westboro Baptist Church, Fred W. Phelps, Sr. (pastor), Shirley L. Phelps-Roper and Rebekah A. Phelps-Davis (members; daughters of pastor).

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INTRODUCTION

This case is about a little church in Topeka, Kansas (Westboro Baptist Church [WBC]), engaging in public speech on a public right-of-way, about issues of vital public interest and importance, over a thousand feet from a public funeral paid for by public funds with public law enforcement overseeing the event, with a large presence of public media who published details about the funeral and deceased soldier before and after the funeral.

The father took offense at the church's words and sued claiming defamation, intentional infliction of emotional distress and invasion of privacy. An inflamed jury awarded nearly $11 million dollars, mostly punitive damages. The church appealed, and the Fourth Circuit set aside the verdict, finding the speech was loose, figurative hyperbolic speech on public issues, which would not cause a reasonable person to believe actual facts were asserted.

Petitioner is asking the Court to find he is a private figure entitled to damages on a subjective claim of outrage over words not proven false; and to find he was a captive audience and thus his privacy was invaded by picketers a thousand feet away whom he never saw or heard.

STATEMENT OF THE CASE

Facts:

"Appendix" refers to the Fourth Circuit Appendix. All Internet materials cited were visited in June 2010.

On March 19, 2003, President George W. Bush declared war in Iraq; the first American casualties occurred by March 22, 2003. By September 11, 2006 – five years after enemies of America crashed planes into the World Trade Center and Pentagon killing thousands – the United States deaths in Iraq surpassed the 9/11 toll. By June 21, 2010, 4,408 American soldiers were dead from the Iraq war. On October 7, 2001, the War in Afghanistan began, and June 2010 marked the most deadly and 104th month of that war, making it the longest war in the history of the United States.

These have been the most reported wars in American history. Photos of the wounded and dead soldiers, and their returning bodies, have been topics of enormous controversy, ending in President Barack Obama lifting a ban on media access to Dover Air Force Base, and directing that costs for families to travel to Dover for the public ritual be paid by the government, in early 2009. Today, 75% of the families choose to have media present, and two-thirds with funerals at Arlington National Cemetery opt for media. As the bodies leave Dover, and travel home, media coverage of the soldiers' lives, deaths, funerals, burials and memorials is constant and intense.

Meanwhile, in May 1990, WBC, a small nondenominational independent Bible-believing flock in Topeka, Kansas (since 1955), began a modest street-preaching ministry because of notorious homosexual activity in the bushes at a nearby public park. This ministry met instant resistance from the entire religious community, and politicians and officials at every level; with time, WBC became known nationally for anti-sin picketing. Homosexuality is addressed (as a front-burner issue), as is fornication, adultery, murder, greed, idolatry and pride. When 9/11 happened, WBC was convinced it resulted from this nation's sin, and reflected God's wrath on the land. They also believe God led the nation into wars as further punishment, and that the soldiers are dying because of America's sin and proud refusal to repent, mourn for its sins, and obey God.

At times before the wars, WBC members picketed funerals which were widely publicized, high-profile, or when the death was used to publicly promote sin. One such was the funeral of Matthew Shepard in Wyoming, which received international media attention, and where various groups were present outside the church engaged in expressive activity during the funeral. Because no one was saying his lifestyle was wrong (just as the murderers were wrong), WBC participated in that public event with that message. The purpose of picketing in connection with funerals is to use an available public platform, when the living contemplate death, to deliver the message that there is a consequence for sin.[1]

As detailed at Issue III, when soldiers die in the Iraq and Afghanistan wars, their funerals are highly publicized events, with extensive media coverage of their lives, deaths and funerals. The funerals are heavily attended by the public, military, government officials/office-holders and politicians; often held in venues other than churches or funeral homes (high schools, civic centers); with large crowds outside, waving flags, playing bagpipes, sometimes marching, sometimes holding signs, all covered by the media. The media is a constant presence, and everyone is talking about the dead soldiers. Most families participate, though a minority decline media contact and have private funerals. Various messages and symbols are published in direct connection with these funerals, except the message that the soldiers are dying for the nation's sins, which WBC publishes believing it is an important part of the debate.

---

[1] Petitioner says at p. 9 of his brief that "in all of recorded history the Phelpses are the only individuals who have chosen to protest at funerals," citing an expert witness at trial with expertise in grief counseling, not history or picketing. The witness said "as far as I know, it never was done." In fact, others have picketed funerals. Another expert witness, when asked if any funerals he had attended had been protested, said: "By all means. I mean, for goodness sake, in the Vietnam era, the Caissons going to Arlington." (Appendix, Vol. X, 2573.) Also, anti-abortion picketers picketed the funeral of the late Associate Supreme Court Justice Lewis F. Powell, Jr., in sight of the funeral-goers. Rea, FT., "How Free Are We to Express Hate?" 6/21/2010, available at http://www2.richmond.com/content/2010/jun/21/how-free-are-we-express-hate/.

Against this national backdrop, Petitioner's son was killed in Iraq on March 3, 2006, in a vehicle crash (Appendix, Vol. VII, 2064 & Vol. VIII, 2137; Vol. XIII, 3667-3671). After his son's death, Petitioner talked to the media about his life, death, and funeral (Appendix, Vol. II, 375-381; Vol. VIII, 2150-2151; Vol. IX, 2334, 2358). Petitioner published an array of details about his son, including the divorce of his parents and the fact he attended the Roman Catholic Church and his funeral was being held at his home parish. (Appendix, Vol. II, at 367-381.) Petitioner also described publicly how upset he was about the war, and told that he contacted the late Congressman John Murtha. Petitioner gave interviews to more than one media immediately after his son's death, before the funeral. And, immediately after the funeral (being dissatisfied with how the funeral was covered), Petitioner contacted the media to complain, which led to more detailed coverage of his son's life, death and funeral. (Appendix, Vol. II, at 389-392, 406.)

Funeral notices were published in multiple newspapers (including the *Baltimore Sun*) and on the funeral home's Website, which included the specific date, time and location of the funeral. (Supplemental Joint Appendix, at 2-7; Exhibit 6 admitted 10/24/07; Appendix, Vol. VIII, 2158-2162; Vol. XV, 3763-3768.) Although his brief at p. 3 says he desired to have a private funeral, Petitioner did not avail himself of the option every family has, of having a private instead of a public funeral, which is done by describing the funeral as "private," when announced, and withholding the specific date, time and location.[2]

Scores of bikers/veterans (Patriot Guard Riders [PGR]) exercised their speech rights by attending the funeral, and engaged in protest activity immediately outside the church, on the road leading up to the church, and southwest of the church on the campus/property, between the seven WBC picketers and the school on campus. Students from this school exercised their speech rights and joined the PGR with picket signs. (Supplemental Joint Appendix, 9, 10, 11, 13.)

Media was expected at the funeral (Appendix, Vol. VIII, 2140, 2150-2151), and sought but did not receive permission to come onto the church campus (Appendix, Vol. VII, 2081; Vol. VIII, 2251). They stayed after WBC left, filming the funeral procession (Appendix, Vol. X, 2649; Vol. XV, 3808, and DVD with footage of this funeral appearing on *20/20*).

The funeral was held March 10, 2006 (Appendix, Vol. XV, 3770). The priest who was the main celebrant was not aware of any picketing; heard no one speak of picketers; saw no disruption of the funeral; and centered the congregation on the funeral (Appendix, Vol. X, 2635-2643). The priest responsible for coordination of logistics picked a place for WBC to stand on a public right-of-way and routed traffic away from them; and arranged for the blinds in the school to be closed, so the children in the school were "completely blocked." (Appendix, Vol. VIII, 2239-2265).

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[2] "The funeral may be either private for family members only or open to the public. If the hours and location are printed in the newspaper notice, it is a sign that all visitors are welcome." Pilato, Donna, "The Etiquette of Funerals and Mourning Rituals," *About.com Guide*, available at http://entertaining.about.com/cs/etiquette/a/funeraletiquett.htm. A family can opt out of a public funeral by announcing the funeral is private, e.g., Wikipedia, "Funeral," http://en.wikipedia.org/wiki/Funeral#Private_service, *see Ross v. Forest Lawn Memorial Park, 153 Cal.App.3d 988, (Ct.App.Calif. 1984)* (right of disposition of body included right to make funeral private); *Rader v. Davis, 154 Iowa 306, (1912)* (right to make funeral private).

The funeral was held at St. John's Catholic Church (Appendix, Vol. IX, 2497-2499; Vol. XV, 3757 and 3758). Seven WBC picketers stood over a thousand feet from the church. The route used by those going to the funeral did not pass the corner where they stood. The turn-in corner for those going into the funeral, including Petitioner, was east of the corner where the WBC picketers stood, and the block between is a substantial hill. Though Petitioner says he saw the tops of some signs, but no content, this would have been physically impossible. A professionally-made video (Supplemental Joint Appendix, last page), and aerial photos of the scene (Supplemental Joint Appendix 1 and 12), reflect that it was physically impossible for anyone going to the funeral to see WBC's picketers (Appendix, Vol. IX, 2475-2491; Vol. XV, 3796 and DVD, Joint Supplemental Appendix, last page [Ex. 19, admitted 10/25/07]; Vol. VIII, 2218-2219, 2294; Vol. IX, 2366, 2495).

WBC did not enter the church or approach anyone going to the church. No one going to the funeral saw them, including Petitioner. Petitioner did not hear them; and, they were gone when he left the church (Appendix, Vol. VII, 2081; Vol. VIII, 2165, 2167-2168.)

WBC contacted law enforcement to advise they would be picketing, for peace-keeping (Appendix, Vol. VIII, 2267-2268; Vol. XV, 3776). Police personnel identified the location where WBC stood (Appendix, Vol. VIII, 2272-2273; Vol. VIII, 2285-2286), and there was no violence or yelling (Appendix, Vol. VIII, 2286-2287; 2293). WBC left [illegible]en the funeral started (Appendix, Vol. VIII, 2289-2290, 2294; Vol. IX, 2371; Vol. XV, 3777). WBC does not engage in civil disobedience, and obeys the law, McAllister, Stephen R., "Funeral Picketing Laws and Speech," 55 *Kansas Law Review* 575, 578 (2007).

WBC's signs said, "Don't Pray for the USA," "God Hates Fags," "God Hates You," "God Hates America," "God's View/Not Blessed Just Cursed," "Semper Fi Fags," "Pope in Hell," "God Hates the USA/Thank God for 911," "You're Going to Hell," "Fag Troops," "Thank God for Dead Soldiers," "Thank God for IEDs," and "Priests Rape Boys" (Appendix, Vol. VI, 1588-1589; Vol. XV, 3784-3787; Phelps, Vol. VIII, 2232).[3]

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[3] Petitioner continues to suggest WBC's "Matt in Hell" sign was at the funeral, knowing this is untrue, arguing people seeing the sign would be unable to discern it applied to Matthew Shepard, not Matthew Snyder. The sign has a picture of Matthew Shepard. Every sign present at this picket was clearly and repeatedly identified in this record; it did not include the "Matt in Hell" sign. That said, WBC has the right to use the

(Continued on following page)

All 1200 seats of the church were full (Appendix, Vol. VIII, 2164; Vol. VIII, 2257-2258). The service was a beautiful military ceremony full of pageantry with Marine pallbearers, a moving tribute (Appendix, Vol. VII, 2081; Vol. VIII, 2168-2172; Vol. X, 2651-2652). Funeral-goers walked through a tunnel of flags, and passed supporters on the path from the church to the cemetery honoring Petitioner's son (Appendix, Vol. VII, 2080-2082; Vol. VIII, 2168-2172; Vol. X, 2651-2653; Vol. XV, 3759-3762). There was no interruption or disruption of the funeral. Petitioner received an outpouring of support, including hundreds of supportive e-mails, calls and cards, and other community support. (Appendix, Snyder, Vol. VII, 2069, 2084; Vol. VIII, 2173-2174; Fisher, Vol. X, 2661-2662.)

Members of the press had a designated spot off church grounds; Petitioner did not see or hear them (Appendix, Snyder, Vol. VIII, 2174; Maas, Vol. VIII, 2272). After the funeral Petitioner talked to the media further about his son, his death, and his funeral (Appendix, Snyder, Vol. VIII, 2151-2154.)

After the funeral, Petitioner saw news stories that included signs and comments by WBC (Appendix, Vol. VII, 2072-2074, 2085-2087; Vol. VIII, 2112). Over a month after the funeral WBC posted an epic about the picket on its Website. It was not sent to Petitioner or anyone else; nothing was done to draw

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sign, and cannot be civilly penalized because someone claims to understand the sign different than what it says, depicts, and means.

attention to it. Petitioner was surfing the Web one day, looking for more praise about his son, when he found the epic and chose to read it (Appendix, Vol. VII, 2062, 2083, 2176-2179; Vol. IX, 2407-2408; Vol. XV, 3788).

Petitioner claimed depression and worsened preexisting diabetes was caused partly by WBC (Vol. VII, 1958-2032). An endocrinologist and psychologist said the death of Petitioner's son was the cause of his depression and flare up of his diabetes (which by trial was well controlled), and that event was so significant and had so much impact, it was not possible to quantify any increase in depression or diabetes symptoms due to WBC's words (Appendix, Vol. X, 2551-2582; Vol. XI, 2746-2797).

WBC members act out of a love for God, the Bible, and their fellow citizens. Their words are seemingly harsh and graphic, because of the crisis they perceive to exist, and because of the reality of the woes coming upon the nation. They are sincere in these beliefs, and study the Scriptures and expositors daily. (Appendix, Vol. VIII, 2190-2191, 2195-2201, 2211-2212, 2215-2217, 2222-2235; Vol. IX, 2328-2355, 2409-2411, 2417-2418, 2421-2434, 2450-2537; and Vol. X, 2547-2550, 2663-3681). An expert in religious history, who personally disagrees with WBC, testified that WBC's religious practices, and preaching about hell to sinners everywhere, including by picketing, is well established in history (Appendix, Vol. X, 2584-2634).

During trial Petitioner turned to WBC members and said, "don't tell me it's love," (Vol. VII, 2073); "their hatred makes me sick," hatred "towards everybody really," (Vol. VIII, 2112); the soldiers in Iraq are "not fighting for hate speech," (Vol. VIII, 2115). He said WBC was "passing judgment on all priests," with "Priests Rape Boys" (Vol. VIII, 2115); should get out if they don't like the country (Vol. VIII, 2116); he prays for their children (Vol. VIII, 2119); he was upset that children were holding signs (Vol. VIII, 2120); the epic contains "more of their Bible hatred," and WBC members don't talk about what God does good (Vol. VIII, 2131-2132); he disagrees this is the United States of Sodom (Vol. VIII, 2136); it is upsetting that anybody would say God killed anyone (Vol. VIII, 2137); and, he doesn't remember anything in the Bible saying to hate (Vol. VIII, 2154-2155).[4]

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[4] At pp. 6, 36 of his brief, Petitioner suggests WBC's picketing is the product of Pastor Phelps seeking revenge because of the conduct of some Marines. This goes against the evidence, including Pastor Phelps' testimony. In one description of many of the condition of things in the nation and military causing WBC to picket, Pastor Phelps described a group of marines assaulting some of the WBC members and simulating anal sex, as an example of where things have gone morally wrong in this nation, not a description of an event for which revenge is sought (Appendix, Vol. VIII, 2226-2227.) Similarly, at p. 6 of his brief, Petitioner complains of Phelps-Davis comment in opening about a "bug" being planted in his head. What she *said*: "The evidence will show we sincerely believe if any of the parents, preachers or leaders of this nation would listen to the little bug in their head that our signs and words may plant, maybe, just maybe some of the thousands of soldiers dying will stop dying." (Appendix, Vol.

(Continued on following page)

Counsel for Petitioner struck similar themes, referring to WBC's publications as "disgusting" videos and Webpage; the "circus" defendants brought to Maryland; a "71-person cult" harassing people all over the country; the "nonsense" of a Bible story and WBC's interpretation of the Bible; that WBC shouldn't go all over the country telling people they're going to hell and irreversibly doomed (Appendix, Vol. XI, 2919-2920, 2923, 2926, 2932). Counsel complained of WBC's children holding signs and flags, mocked WBC's use of the term "earth dweller," and criticized all the signs at the picket (Appendix, Vol. XI, 2929, 2930-2931, 2935-2936). During closing argument on punitive damages, counsel argued for a finding of malice because WBC said they are prophets, seers, and swords in the hand of God, who claimed to know God's will; because their picket signs use the word "hate;" because WBC would not apologize for the message; because of "manic looks" on the children's faces in the sign movies; and because WBC celebrates the death of soldiers (Appendix, Vol. XII, 1131-1133).

Proceedings Below:

Petitioner sued for defamation, invasion of privacy through publication of private facts, invasion of privacy through intrusion upon seclusion, and intentional infliction of emotional distress (IIED).

VII, 1956.) This quibbling about WBC's words underscores that this case is about viewpoint.

Summary judgment was granted on defamation, because WBC's speech was religious opinion, and Petitioner had no loss of reputation (Appendix, Vol. V, 1214-1219); and, on invasion of privacy by publishing private facts, because no private facts were published (Vol. V, 1224-1227).

Summary judgment was denied on the IIED claim and intrusion upon seclusion based on the content of three signs, "God Hates You," "You're Going to Hell," and "God Hates Fags" (Vol. V, 1255, 1273), saying the "key factor" was that they could be "interpreted" as targeting Petitioner (Vol. V, 1274-1279, 1298-1300). The court said "Don't Pray for the USA" and "Pope in Hell" were protected (Vol. V, 1259-1261, 1299), though these signs along with all of the signs and all of the religious words of WBC were put in front of the jury to serve as a basis for liability.[5]

The trial court ruled pretrial that the time frame for liability was the immediate aftermath of the funeral, a few days. Then when reminded by WBC the epic was written over a month later, the trial judge instantly extended the time period to the date of the epic. (Appendix, Vol. V, 1355-1359).

During trial, the jury was instructed at the outset that speech which is "'vulgar,' 'offensive,' and 'shocking,' is not entitled to absolute constitutional protection under all circumstances,"[6] (Appendix, Vol. VII, 1916-1917). The jury was also allowed to determine whether the speech was private or public (Instruction No. 21, Appendix, Vol. XII, 3113-3114), and not instructed on actual malice (Instruction No. 28, Appendix, Vol. XII, 3121).

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[5] "The finding against petitioner was a general one. It did not specify the testimony upon which it rested." *Thornhill v. Alabama, 310 U.S. 88, 96, (1940).*

The jury returned a verdict of $2.9 in compensatory damages and $8 million in punitive damages (Appendix, Vol. XII, 3136, 3140). The trial court denied post-trial motions, but remitted the verdict to $5.1 million, saying: "A reasonable jury could find, however, that when Snyder turned on the television to see if there was footage of his son's funeral, he did not 'choose' to see close-ups of the Defendants' signs and interviews with Phelps and Phelps-Roper, but rather their actions intruded upon his seclusion," *Snyder v. Westboro Baptist Church, 533 F.Supp. 567, 581 (D.Md. 2008)*. The trial court also said in upholding the damages award: "Plaintiff also testified as to the permanency of the emotional injury. He testified that 'I think about the sign [Thank God for Dead Soldiers] every day of my life. . . . I see that sign when I lay in bed at nights,'" *533 F.Supp. at 589*.

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[6] This language comes from the Court's opinion in *FCC v. Pacifica Foundation, 438 U.S. 726 (1978)*, pertaining to whether the FCC could regulate broadcast speech. Although Petitioner saw the signs and heard the words over the TV, he did not sue the TV station. So FCC regulations of uniquely-positioned broadcast speech are not applicable in this case.

Fourth Circuit Decision:

The Fourth Circuit reversed, *Snyder v. Phelps, 580 F.3d 206 (4th Cir. 2009),* saying although there is no categorical constitutional defense for statements of opinion, there are two *types* of speech for which tort liability may not attach under the Constitution (noting there is no suggestion WBC's speech falls into an unprotected category), *580 F.3d at 218 & footnote 12.* "First . . . statements on matters of public concern that fail to contain a 'provably false factual connotation,'" *580 F.3d at 219.* "Second, rhetorical statements employing 'loose, figurative, or hyperbolic language,'" *580 F.3d at 220.*

Per *Milkovich v. Lorain Journal Co., 497 U.S. 1 (1990)* the court said it was obligated to assess how an objective, reasonable reader would understand challenged statements by focusing on the plain language and the context and general tenor of its message, *580 F.3d at 219.*

The court held that the district court fatally erred by allowing the jury to decide whether the speech was public or private, and therefore at a minimum a new trial could be necessary, *580 F.3d at 221*, unless after their review WBC prevailed as a matter of law on the whole record, 580 *F.3d at 221-222.*

Analyzing the language of the signs, the court said they involved matters of public concern, including the issue of homosexuals in the military, the sex-abuse scandal within the Catholic Church, and the political and moral conduct of the United States and its citizens, *580 F.3d at 222-223*. (As discussed at Issue III below, WBC believes their speech addresses additional topics of public concern which are the war and dying soldiers.) Also, the court said no reasonable reader could interpret the signs as asserting actual and objectively verifiable facts about Snyder or his son. And, the statements were further protected because they did not assert provable facts about an individual, and they clearly contain imaginative and hyperbolic rhetoric intended to spark debate, *580 F.3d at 223*. Looking closer at the signs "God Hates You" and "You're Going to Hell," the court concluded they also contained no asserted provable facts and contained strong elements of rhetorical hyperbole and figurative expressions. *580 F.3d at 224*. "A distasteful protest sign regarding hotly debated matters of public concern, such as homosexuality or religion, is not the medium through which a reasonable reader would expect a speaker to communicate objectively verifiable facts," *580 F.3d at 224*.

A similar conclusion was reached after examining the content and style of the epic, because it could not be divorced from the general context of the funeral protest, and was primarily concerned with WBC's strongly held views on matters of public concern, so a reasonable reader would understand its contents to be primarily focused on the more general message to which the protests are directed. Noting the epic was a recap of the protest and was distributed through WBC's website, the court said it would not lead the reasonable reader to expect actual facts about Snyder or his son to be asserted therein, because it was "the work of a hysterical protestor rather than an objective reporter of facts," *580 F.3d at 225*.

Finally, the court said that its decision did not prevent states from placing reasonable and content-neutral time, place, and manner restrictions to "protect the sanctity of solemn occasions such as funerals and memorials," *580 F.3d at 226*; and *see 580 F.3d at 218 & footnote 10.*

The majority opinion said WBC did not challenge the sufficiency of the evidence on appeal, *580 F.3d at 216-218*. However a concurring opinion held that Petitioner failed to prove his case by sufficient evidence, *580 F.3d at 227*, saying there was no intrusion; because WBC was in a public place 1,000 feet away, and never confronted Snyder who never saw them; and the funeral was not disrupted. *580 F.3d at 230.* And, WBC posting the epic on the church Internet was not intrusion, because WBC did not bring it to Petitioner's attention, who learned of it surfing the Internet and chose to read it. *580 F.3d at 231*. Also, that the protest was not outrageous because it was in a public area and did not disrupt the funeral. Finally, the epic which the district court found to be non-defamatory as a matter of law was not sufficient to support a finding of extreme and outrageous conduct, *580 F.3d at 232*.

◆

SUMMARY OF THE ARGUMENT

Petitioner's claim for intentional infliction of emotional distress must fail because WBC's speech was public speech, and was not proven false. The Court has historically treated false and not-proven-false speech differently, giving more protection to speech not proven false. The *Hustler Magazine v. Falwell, 485 U.S. 46 (1988)* case requires that any speech on public matters that is targeted by the tort of IIED must be shown false and uttered with actual malice. The effort to prove falsity failed in this case, and the jury was not instructed on actual malice, nor is there any evidence of actual malice. The Constitution is imperiled if a subjective claim of outrage can be used to penalize into silence speech that does not make false statements of fact, uttered in public arenas on public issues.

Petitioner made himself a limited purpose public figure when he spoke with the media extensively immediately after his son's death and when he sought out the media for more coverage immediately after his son's funeral. And he has made expansive use of the media and been wildly successful in persuading the entire country that his son is a hero and WBC is a villain whose words should be utterly disregarded, thereby enjoying all the benefits of a public figure.

The content, form and context show WBC's speech is public and thus protected. For an additional reason WBC's words are protected, which is because of the *type* of words. They are hyperbolic, figurative, loose, hysterical opinion. By their content, form and context, no reasonable reader could conclude they contain provable facts, but rather are clearly opinion, spoken about facts available equally to everyone.

Petitioner's invasion of privacy claim must fail because he was not a member of a captive audience. Funerals, generally, are public events (unless specifically designated as private). This is especially true with soldiers' funerals. So the nature of the event does not make Petitioner a captive audience. Nor do WBC's actions and modus operandi when picketing, because they did not block, interfere or confront, and they were out of sight and sound. No privacy interest should be allowed based on a mourning bubble, especially when the claim is based on words not proven false, because of the unworkable subjective nature of such a zone of privacy.

Finally, it is not necessary to balance interests in this case, and such a claim poses false alternatives in this case. All parties' rights were fully protected; Petitioner was able to assemble and engage in religious rituals; WBC's speech had no impact on his ability to do so. The Court should decline the invitation to do any unnecessary balancing of rights in this case.

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ARGUMENT

I. PETITIONER'S CLAIM FOR INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS MUST FAIL BECAUSE IT IS BASED ON SPEECH BY WESTBORO BAPTIST CHURCH THAT WAS ON PUBLIC ISSUES, AND WAS NOT FALSE STATEMENTS OF FACT (AND BECAUSE PETITIONER IS NOT A PRIVATE FIGURE).

The law of this case is that the words of WBC are not false statements of fact, because Petitioner lost on his defamation claim, and did not appeal. Petitioner asks the Court to find that he is a private figure, and therefore his IIED claims should be allowed to stand against not-false speech. He wants exemption from the requirement of *Hustler Magazine v. Falwell, 485 U.S. 46, 53 (1988)*, that falsity and actual malice be shown to sustain an IIED claim against public speech.

Legal precedent establishes that false speech should be treated differently from not-proven-false speech. In *Schenck v. United States, 249 U.S. 47, 52 (1919)*, the Court noted: "The most stringent protection of free speech would not protect a man in ***falsely shouting fire*** in a theatre and causing a panic" (emphasis added). (If the theatre was on fire, it would be cruel and possibly unlawful *not* to shout "fire.") As early as *Garrison v. State of Louisiana, 379 U.S. 64, 75 (1964),* the Court established that the Constitution can tolerate sanctions against calculated falsehoods, but not honest utterances even if inaccurate.

Since at least *New York Times Co. v. Sullivan, 376 U.S. 254 (1964),* this Court has wrestled with how to balance states' interests in protecting their citizens from harm by tortious conduct against the right of all citizens to engage in robust public debate.[7] The question in each case is whether the balance will discourage publishers from exercising constitutional guarantees. Finding the right balance is not mindless matrix-driven algorithm; it's an application of core constitutional principles to a given situation.

The theme that emerges from the cases is that the bedrock of the *First Amendment's* protection of speech is preserving the ability of citizens to engage in wide-open, robust, uninhibited speech on public matters. (Experience teaches this protection is *most necessary* when the words are *least popular* or *most offensive*.)

Thus, in *New York Times*, while holding defamation claims by public officials can only be sustained on a showing of actual malice, the Court said:

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[7] The Fourth Circuit's concurring opinion held Petitioner's evidence was insufficient to establish tort liability, because his own acts exposed him to words he did not like, and no disruption of the funeral occurred. WBC believes this issue has been preserved, and the evidence is insufficient, and so asserts here. There is not a pressing concern here about protecting Petitioner from tortious conduct.

> The general proposition that freedom of expression **upon public questions** is secured by the *First Amendment* has long been settled by our decisions. The constitutional safeguard, we have said, "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people,". . . .
>
> Thus we consider this case against the background of a profound national commitment to the principle that debate on **public issues** should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials. . . . The present advertisement . . . **on one of the major public issues of our time (racism)**, would seem clearly to qualify for the constitutional protection.

376 U.S. at 269-273; emphasis added.

In *Time, Inc. v. Hill, 385 U.S. 374, 389 (1967)*, a family that had been the victim of a crime alleged Life Magazine falsely reported that a new play portrayed their experience. The Court reversed and remanded a judgment against the publisher, saying that constitutional guarantees of free speech and press meant the publisher was entitled to an instruction that there could be no liability without a finding of knowing or reckless falsity.

> In this context, sanctions against either innocent or negligent misstatement would present a grave hazard of discouraging the press

> from exercising the constitutional guarantees. Those guarantees are not for the benefit of the press so much as for the benefit of all of us. A broadly defined freedom of the press assures the maintenance of our political system and an open society.

385 U.S. at 389.

In *Curtis Pub. Co. v. Butts, 388 U.S. 130 (1967)*, the Court dealt with two cases involving public *figures* who claimed they were libeled. Deciding in cases involving public figures a higher standard was necessary, so recovery could only be had upon a showing of highly unreasonable conduct that constituted an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers, the Court again emphasized the importance of protecting speech on public issues:

> We fully recognize the force of these competing considerations and the fact that an accommodation between them is necessary not only in these cases, but **in all libel actions arising from a publication concerning public issues.**

388 U.S. at 147; emphasis added. And at footnote 19: "Nor does anything we have said touch, in any way, libel or other tort actions not involving public figures **or matters of public interest**," *388 U.S. at 155*; emphasis added.

In *Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971)*, the Court in a plurality opinion said that in a case involving a "private individual," involving speech on a matter of public or general concern, the actual malice standard applied. "We honor the commitment to robust debate on public issues which is embodied in the *First Amendment*, by extending constitutional protection to all discussion and communication involving matters of public or general concern, without regard to whether the persons involved are famous or anonymous," *403 U.S. at 43-44*.

Three years later in *Gertz v. Welch, 418 U.S. 323 (1974),* the Court pulled back from *Rosenbloom* some, holding that the *First Amendment* protection afforded news media against defamation suits by public persons is not to be extended to *defamation suits* by private individuals, even though the defamatory statements concern an issue of public or general interest, *so long as* liability is not imposed without fault, and recovery is limited to actual damages, not punitive. (For many reasons, punity damages are completely unsustainable in this case.)

> We begin with the common ground. Under the *First Amendment* there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas. But there is no constitutional value in false statements of fact. . . .
>
> * * *
>
> . . . In our continuing effort to define the proper accommodation between these competing concerns, we have been especially

> anxious to assure to the freedoms of speech and press that "breathing space" essential to their fruitful exercise. . . .

418 U.S. at 339. The Court cited the ability of public officials and figures "usually" to access channels of effective communication to counteract false statements, and that they have assumed a role in the forefront of public controversies or government; *and* that it would be difficult for state and federal judges to "decide on an *ad hoc* basis which publications address issues of 'general or public interest,'" *418 U.S. at 344-345*.

In *Farmer v. United Brotherhood, 430 U.S. 290 (1977)* the Court signaled using IIED to inhibit robust debate would be disfavored. Finding that the National Labor Relations Act did not preempt state law, the Court cautioned:

> . . . . The potential for undue interference with federal regulation would be intolerable if state tort recoveries could be based on the type of robust language and clash of strong personalities that may be common-place in various labor contexts.

430 U.S. at 305-306.

The Court resolved the *Gertz* concern about lack of criteria to determine if speech is public or private, by its decision in *Dun & Bradstreet v. Greenmoss Builders, Inc., 472 U.S. 749 (1985)*. There a credit reporting company made a false credit report about another private company. The Court said the actual malice standard did not apply, because the speech did not involve an issue of public concern. Noting the "'special concern [for speech on public issues] is no mystery,'" the Court said: "It is speech on 'matters of public concern' that is 'at the heart of the *First Amendment's* protection,'" *472 U.S. at 758-759.* "[T]he Court has frequently reaffirmed that speech on public issues occupies the 'highest rung of the hierarchy of *First Amendment* values,' . . . [i]n contrast, speech on matters of purely private concern is of *less First Amendment* concern," and "the role of the Constitution in regulating state libel law is far more limited when the concerns that activated *New York Times* and *Gertz* are absent," *472 U.S. at 759.* "While such speech is not totally unprotected by the *First Amendment*, . . . its protections are less stringent," *472 U.S. at 760.*

On how to determine if speech is public, the Court said: "[W]e have held that '[w]hether . . . speech addresses a matter of public concern must be determined by [the expression's] content, form, and context . . . as revealed by the whole record,'" *472 U.S. at 761.*

Then in *Philadelphia Newspapers v. Hepps, 475 U.S. 767 (1986),* the Court held that a private figure seeking damages in a defamation action against a newspaper had to prove that a statement of public concern was false. In other words, the private plaintiff could no longer avail himself of the common-law presumption that defamatory speech is false when the speech is on a matter of public concern. The Court said:

> One can discern in these decisions two forces that may reshape the common-law landscape to conform to the *First Amendment*. The first is whether the plaintiff is a public official or figure, or is instead a private figure. The second is whether the speech at issue is of public concern. When the speech is of public concern and the plaintiff is a public official or public figure, the Constitution clearly requires the plaintiff to surmount a much higher barrier before recovering damages from a media defendant than is raised by the common law. When the speech is of public concern but the plaintiff is a private figure, as in *Gertz*, the Constitution still supplants the standards of the common law, but the constitutional requirements are . . . less forbidding. . . .

475 U.S. at 775.

The outcome of *Falwell* given the above cases should have come as no surprise; and it should be equally clear that this outcome should be the same whether a plaintiff claims private status or public figure status, when the topic of the speech is matters of public interest, and when the sole theory is IIED and the claimed wrong is only words.

In rejecting liability based on words that "could not reasonably have been interpreted as stating actual facts," about a public figure, *485 U.S. at 48*, the Court said:

> At the heart of the *First Amendment* is the recognition of the fundamental importance of

> the free flow of ideas and opinions on matters of public interest and concern. "The freedom to speak one's mind is not only an aspect of individual liberty – and thus a good unto itself – but also is essential to the common quest for truth and the vitality of society as a whole. . . ." We have therefore been particularly vigilant to ensure that individual expressions of ideas remain free from governmentally imposed sanctions. The *First Amendment* recognizes no such thing as a "false" idea. . . .

485 U.S. at 51. Falwell argued that so long as the utterance was intended to inflict emotional distress, was outrageous, and did in fact inflict serious emotional distress, it is of no constitutional import whether the statement was a fact or an opinion, or whether it was true or false. The Court rejected this position: "But in the world of debate about public affairs, many things done with motives that are less than admirable are protected by the *First Amendment*. . . . Thus while such a bad motive may be deemed controlling for purposes of tort liability in other areas of law, we think the *First Amendment* prohibits such a result in the area of public debate about public figures." *485 U.S. at 50.*

After discussing historical examples of the use of the cartoon parody (historical examples of preachers speaking about hell and sin include from the Bible, Noah, Jeremiah, John the Baptist, John the Beloved, and Christ, and American theologian Jonathan Edwards), the Court said:

> "Outrageousness" in the area of political and social discourse has an inherent subjectiveness about it which would allow a jury to impose liability on the basis of the jurors' taste or views, or perhaps on the basis of their dislike of a particular expression. An "outrageousness" standard thus runs afoul of our longstanding refusal to allow damages to be awarded because the speech in question may have an adverse emotional impact on the audience. . . .

485 U.S. at 55-56. So the Court concluded that a public figure or public official could not recover for the tort of IIED by reason of publications without proving falsity and actual malice.

Petitioner would have us overlook all these powerful principles about protecting public speech, and uphold a multi-million dollar verdict for not-proven-false speech, on the subjective standard of "outrageousness," without any showing of falsity or fault, simply because he claims he is a private figure.

The speech at issue in this case was public in every sense. It was about publicly-funded funerals of publicly-funded soldiers dying in an extremely public war, because (in WBC's opinion) of very-public policies of sin, including homosexuality, divorce, remarriage, and Roman Catholic priests molesting children. The content of the speech is religious commentary on current events of significant import, with numerous statements (on signs and by epic) about God, his wrath and other attributes, this nation's sins, and its consequences (including on the battlefield). The form of the speech is quintessential public speech, using picket signs on public right-of-ways; interviews with the media; and commentary on the Internet. The context of the speech is a longstanding war of worldwide renown; one of thousands of public funerals for dead soldiers; commenting on information published in the media; part of a dialogue in which hundreds (and thousands) are participating (whether about the funeral that day or the funerals of soldiers in total), in proximity of a church that is part of the Roman Catholic organization; about the practices of the military (and consequences for those practices) which then and now occupy front pages and airwaves daily.

No speech could be more public than this speech. To cast aside the longstanding body of law about the importance of giving public speech breathing room; and to ignore the concerns this Court raised about letting liability attach for *not-proven-false words* on a subjective standard; all because Petitioner claims he's a private figure, stands all these constitutional principles on their heads.[8]

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[8] Petitioner relies on a few state court cases to suggest private individuals should not be covered by *Falwell*; reviewing them reveals they do not support his position. In *Esposito-Hilder v. SFX Broadcasting, Inc., 665 N.Y.S.2d 697 (1997)*, the court upheld a case moving forward where disc jockeys of a competitor radio station used their "Ugliest Bride" contest to name and vilify plaintiff. The court noted "the unique factual circumstances presented," 665 N.Y.S.2d at 699, where the conduct involved no matter of public interest or concern, *and* the parties

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Petitioner's brief "spills considerable ink," *Christian Legal Society v. Martinez, 2010 U.S. LEXIS 5367 at 26-27 & footnote 6 (U.S. June 28, 2010)* trying to persuade that WBC has a hateful motive, endeavoring to strengthen the IIED claim. But the Court has rejected the idea of punishing speech on public issues because it is characterized as uttered with ill-will. "'Debate on public issues will not be uninhibited if the speaker must run the risk that it will be proved in court that he spoke out of hatred,'" *BE&K Construction Co. v. National Labor Relations Board, 536 U.S. 516, 534 (2002). See also NAACP v. Claiborne, supra, 458 U.S. 886 (1982)* (speech on the public issue of racism protected even if speaker likely foresaw sustained economic injury merchants would sustain from boycott). WBC is motivated to warn people not to go to hell, and of the consequences of national policies of sin. And WBC did this warning

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were business competitors. Further, *State v. Carpenter, 171 P.3d 41 (Alaska 2007)* involved a plaintiff who complained about the language of a talk show host, who then encouraged people to call, fax and harass plaintiff in her home. Her claim was "not based on the truth or falsity of . . . words . . . [or] harm to her reputation," and thus no heightened protection, 171 P.3d at 56. In *Van Duyn v. Smith, 173 Ill.App.3d 523 (1988)* an abortion doctor sued an anti-abortion protester for *unprotected* acts of following her in her car, confronting her physically and preventing her ingress and egress, for which the court reversed the trial court's dismissal, *see 173 Ill.App.3d at 533-534.* None involve IIED claims for words ("defamation-based claims," *see Chapman v. Journal Concepts, Inc., 528 F.Supp.2d 1081 (D.Haw. 2007)*), on matters of public interest, *see Bass v. Harville Hendrix, 931 F.Supp. 523 (S.D.Tex. 1996).*

through public speech in public arenas about public matters.

Finally, the Court should reject Petitioner's claim that he is a private figure. When Petitioner made the decision to speak to the media on the matter of his son's death, revealing various details about his son's life, death and funeral, and his own anti-war views; he thrust himself into an ongoing controversy about war and dying soldiers. When he published the specific date, time and location of his son's funeral, he ensured the funeral itself was public. When he *sought out* the media immediately after his son's funeral (before the epic was written) to further shape the coverage of his son's life, death and funeral, he availed himself of access to the media to shape and impact the outcome of the issues of his son's death and funeral and WBC's picketing of his funeral. *See Waldbaum v. Fairchild Publications, Inc., 627 F.2d 1287 (D.C.Cir. 1980), cert. denied, 449 U.S. 898 (1980).*

Further, Petitioner has all the benefits of a public figure. He has enjoyed massive national and even international favorable media about his efforts to silence WBC and about his son's heroism. He was able to get the full community rallied around him for the funeral, so that for 15 miles the streets were lined with well-wishers doing a communal salute. He has also been able through a sophisticated public relations campaign, to raise funds and cause literally thousands of people to reinforce him and give him public support.

Unlike the plaintiff in *Wolston v. Reader's Digest, 443 U.S. 157, 167 (1979)* who never discussed the matter with the press, Petitioner voluntarily spoke with the media multiple times and initiated contact with them. Unlike the plaintiff in *Hutchinson v. Proxmire, 443 U.S. 111 (1979)*, Petitioner was not pulled involuntarily into the public discussion; he actively and voluntarily participated, under no compulsion of any kind. Similar to the plaintiff in *Grass v. News Group Publications, Inc., 570 F.Supp. 178, 181 (S.D.N.Y. 1983)*, Petitioner scanned the Internet monitoring words about his son as part of his interaction with the media. Similar to the plaintiff in *Lohrenz v. Donnelly, 350 F.3d 1272 (D.C.Cir. 2003)*, where one of the first two women combat pilots talked to the media knowing her role was controversial, Petitioner talked to and sought the media knowing the wars and dying soldiers were controversial.

II. PETITIONER'S CLAIM FOR INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS MUST FAIL BECAUSE WBC'S LOOSE, FIGURATIVE, HYPERBOLIC SPEECH, WHICH NO REASONABLE READER COULD INTERPRET AS STATING ACTUAL FACTS, IS PUBLIC-ISSUE SPEECH (AND BECAUSE PETITIONER IS NOT A PRIVATE FIGURE).

Petitioner seeks exemption from the holding in *Milkovich* claiming he is a private figure or WBC's public speech targeted him; his IIED claims are different from his defamation claims; and WBC came to the funeral uninvited. For the reasons discussed at Issue I above, Petitioner is not a private figure.

Speech on public issues tops the hierarchy of public commentary. There is no credible effort to establish that WBC's speech was not on public issues, beyond saying it targeted Petitioner and his son, as if somehow WBC is obligated to remain silent about the soldiers and their families in this public debate, while everyone else is talking about them. There is nothing unlawful about targeting speech to or about a person. Indeed, a speaker is entitled to reach his or her "target audience" with a message, if otherwise lawfully done. (As discussed at Issue III and footnote 10, the "target" or "focus" that states can reasonably limit as to time, place and manner, pertains to proximity targeting, not content-targeting.)

It is indefensible to say the IIED claim is any different from the failed-defamation claim. All of the claims in this case are about the words uttered by WBC. The trial court record is permeated with criticism about the words; the injury alleged to have been inflicted is because of the words (e.g., Petitioner says he sees the *words* at night lying in his bed). The IIED claim is based on the content of the signs and words to the media as seen by Petitioner in the news, and the content of the epic as seen by Petitioner on the Internet.

As to the claim that *Milkovich* should not apply because WBC came uninvited to the funeral with the intention of disrupting the religious ritual, as discussed at Issue IV, WBC did not attend the funeral; did not have an intention of disrupting, and did not disrupt; the religious rituals were all completely fulfilled and fulfilling. (Having said that, it is reasonable to add that once Petitioner invited the public to the funeral, the invitation included WBC members.) By being out of sight and sound of Petitioner and all those attending the funeral, it was impossible for WBC to have disrupted the religious ritual. And WBC does not require an invitation to be on a public right-of-way peacefully picketing.

After *Falwell*, which forecast that speech which could not reasonably be taken to state facts about a person is protected, the Court issued its decision in *Milkovich*. "We have also recognized constitutional limits on the *type* of speech which may be the subject of state defamation actions," *497 U.S. at 16*. This includes words that are no more than rhetorical hyperbole, or vigorous epithet; and words which could not reasonably have been interpreted as stating actual facts, used in a loose, figurative sense, *497 U.S. at 17*. While rejecting the notion that *Gertz* requires a "wholesale defamation exemption for anything that might be labeled 'opinion,'" *497 U.S. at 18*, the Court said "*Hepps* ensures that a statement of opinion relating to matters of public concern which does not contain a provably false factual connotation will receive full constitutional protection," *497 U.S. at 20*.

Petitioner complains that adding the element of falsity to an IIED claim causes a plaintiff to lose protection from entire categories of expressive conduct, saying the speaker can ensure constitutional immunity by uttering statements so outrageous that they fail to contain a provably false factual connotation. (Brief for Petitioner, pp. 42-43.) But doing so is consistent with the protection of the *First Amendment*, and Petitioner lacks grace complaining about it given that his claims of falsity *failed*. This complaint utterly ignores the constitutionally-appropriate concern the Court raised in *Falwell*, that a subjective standard of "outrageousness," could render *speech* tortious, even on public matters. Letting liability attach to not-proven-false words on public issues because a person subjectively claims to be "outraged" – when that same person has articulated in plain words how much he loathes the religious viewpoint of the speaker – would simply rip the *First Amendment* to useless shreds.

The words on WBC's signs and in their epic – as the Fourth Circuit noted – have the tone of a hysterical protester. WBC is passionately trying to warn people about hell; the *nature* of that message is hysterical protest. Further, the nature of the communication shows that it is commentary on information that is equally available to everyone (such as the "don't ask/don't tell" military policy; the scandal of sex abuse in the Roman Catholic church; the details of Petitioner's divorce; etc.). The signs and epic contain language that plainly shows it is religious commentary, purposefully hyperbolic. In *Gardner v. Martino, 563 F.3d 981 (9th Cir. 2009)*, plaintiffs sued after a customer called a national syndicated radio talk show to complain about a product, and in the course of the discussion the talk show host responded, saying plaintiffs were lying to the customer, and that the company plaintiff "sucks." The court considered the nature of the show, that it had drama, hyperbolic language, an opinionated and arrogant host, and heated controversy, *563 F.3d at 988*. The court also said concerning the "lying" statement, that no reasonable listener could consider the statements to imply an assertion of objective facts rather than "an interpretation of the facts equally available to Martino and the listener," *id.* Similarly, here, WBC's speech is in a format showing it is religious commentary; and its content shows it is an expression of strong religious opinion, interpreting and expressing religious opinions on facts equally available to the listener.

III. PETITIONER'S INVASION OF PRIVACY CLAIM MUST FAIL BECAUSE HE WAS NOT A MEMBER OF A CAPTIVE AUDIENCE, AND EVEN IF HE WAS, WESTBORO BAPTIST CHURCH'S SPEECH OCCURRED WELL OUTSIDE ANY ZONE OF PRIVACY THE COURT MIGHT EVER RECOGNIZE IN A PUBLIC FUNERAL.

Petitioner says he was a captive audience at his son's funeral. This position rests on the notion that funerals are customarily private. The opposite is true. Funerals are not historically or by nature private events, but are most commonly held in the presence of and for the public. This holds true for funerals in general; for soldiers' funerals; and for the funeral of Petitioner's son. A family member can opt for a private funeral; but the norm is a public funeral.

Also, there was no proximity between WBC and Petitioner that created a captive audience. So whether because of where he was and/or what he was doing; or because of what WBC members did; Petitioner was not a captive audience. Even if going into a public funeral as a mourner placed Petitioner into the status of a captive audience, WBC was far outside any zone of privacy around him during or after the funeral. The flaw in Petitioner's position is he wants to equate his disagreement with words – no matter where, when, how, or in what form he saw them – with captive audience status. The Court's opinions will not support this conclusion.

The Court has recognized a captive audience as a physical or aural concept, such as employees during working hours forced to listen to denunciations of a union, *NLRB v. United Steelworkers of America, 357 U.S. 357, 368 (1958)*; or people in hearing of sound trucks with loud and raucous noises on city streets, *Ginsberg v. New York, 390 U.S. 629 (1968),* Stewart, J., concurring, citing *Kovacs v. Cooper, 336 U.S. 77, 86 (1949).* The Court found a captive audience in the home, saying the right of a mailer stops at the outer boundary of every person's domain, in *Rowan v. United States Post Office, 397 U.S. 728, 738 (1970).* The notion that commuters are a captive audience on a transit system caused the Court to uphold a city policy of not permitting political advertising on its transit vehicles in *Lehman v. City of Shaker Heights, 418 U.S. 298, 302-303 (1974).* In *Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975),* the Court found an ordinance prohibiting showing films with nudity in a drive-in movie theater when the screen is visible from a public street or place invalid, saying selective restrictions by the government to shield the public from some kinds of speech on the ground that they are more offensive than others, have been upheld only when the speaker intrudes on the privacy of the home, or the degree of captivity makes it impractical for the unwilling viewer or auditor to avoid exposure, *422 U.S. at 209.* "The ordinance seeks only to keep these films from being seen from public streets and places where the offended viewer readily can avert his eyes," *422 U.S. at 212.*

In *Consolidated Edison Co. v. Public Service Commission, 447 U.S. 530 (1980),* the Court found that the state public service commissioner's order barring utilities from including inserts discussing controversial public policy issues violated the *First Amendment.* "The customers of Consolidated Edison may escape exposure to objectionable material simply by transferring the bill insert from envelope to wastebasket," *447 U.S. at 541-542.* In *Bolger v. Youngs Drug Products Corp., 463 U.S. 60, 72 (1983),* the Court held that a federal ban on unsolicited mailings advertising contraceptives violated the *First Amendment* for similar reasons.

> It matters whether a law regulates communications for their ideas or for their style. Governmental suppression of a specific point of view strikes at the core of *First Amendment* values. In contrast, regulations of form and context may strike a constitutionally appropriate balance between the advocate's right to convey a message and the recipient's interest in the quality of his environment.

463 U.S. at 83-84, Stevens, J., concurring.

In upholding New York's guidelines for sound-amplification equipment, in *Ward v. Rock Against Racism, 491 U.S. 781, 798 (1989)*, the Court affirmed that citizens can be protected from unwelcome excessive noise. And in *United States v. Kokinda, 497 U.S. 720 (1990)*, the Court upheld a prohibition against in-person solicitation of funds on a government-owned sidewalk adjoining the post office because it was directly confrontational and intimidating, *497 U.S. at 734*.

Against this framework, the Court addressed captive audiences in several cases involving "the currently disfavored class of antiabortion protesters," *Lawson v. Murray, 515 U.S. 1110, 1116 (1995),* Scalia, J., concurring in denial of a petition for a writ of certiorari. The Court upheld a ban on picketing "before or about" a residence, noting the unique nature of the home, because of the impact on domestic tranquility with the resident knowing a stranger is lurking just outside. The Court noted that if the resident used his or her home as a place of business or for a public meeting the outcome would be different, *Frisby v. Schultz, 487 U.S. 474, 487-488 (1988).* (Using a church or cemetery for a quiet private funeral is very different from using it for a loud, splashy, noisy, patriotic pep rally.) In ***Madsen v. Women's Health Center, Inc., 512 U.S. 753 (1994)***, the Court upheld an injunction with a 36-foot buffer zone on a public street after instances of blocking and interfering with public access to the clinic, and physical abuse of persons entering or leaving the clinic. Picketers impeded access by congregating on the paved portion of the street directly in front of the clinic, by slowing down vehicles turning in by marching in front of the driveway, and by groups from a handful to 400 singing, chanting and using loudspeakers and bullhorns. *512 U.S. at 758.* The Court invalidated the 36-foot zone in other directions where no obstruction or interference had occurred, *512 U.S. at 772.* The Court upheld a limited noise restriction so patients at the clinic would not have to undertake Herculean efforts to escape the cacophony of political protests, *id.*

> The same, however, cannot be said for the "images observable" provision. . . . The only plausible reason a patient would be bothered by "images observable" inside the clinic would be if the patient found the expression contained in such images disagreeable. But it is much easier for the clinic to pull its curtains than for a patient to stop up her ears, and no more is required to avoid seeing placards through the windows of the clinic.

> This provision of the injunction violates the *First Amendment.*

512 U.S. at 773. The Court invalidated a 300-foot no-approach buffer as too broad to address picketers stalking or shadowing patients or clinic staff. And the Court invalidated a 300-foot zone around residences, *512 U.S. at 776.*

Six years later in *Hill v. Colorado, 530 U.S. 703, (2000),* the Court upheld a Colorado state statute making it unlawful within 100 feet of a health care facility to knowingly approach within 8 feet of another person, without that person's consent, to engage in picketing, counseling, or related expressive activity. The law was passed in response to abortion picketers impeding access to clinics, and having face-to-face encounters with people coming and going at the clinics, described by at least one witness as "standing in your face screaming at you," *530 U.S. at 710.*

> . . . . None of our decisions has minimized the enduring importance of "a right to be free" from **persistent "importunity, following and dogging"** after an offer to communicate has been declined. While the freedom to communicate is substantial, "the right of every person 'to be let alone' must be placed in the scales with the right of others to communicate." . . . It is that right, as well

> as the right of **"passage without obstruction,"** that the Colorado statute legitimately seeks to protect. . . .
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> * * *
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> [W]hether there is a "right" to avoid unwelcome expression is not before us in this case. The purpose of the Colorado statute is not to protect a potential listener from hearing a particular message. It is to protect those who seek medical treatment from the potential physical and emotional harm suffered when an unwelcome individual delivers a message (whatever its content) **by physically approaching an individual at close range, i.e., within eight feet**. . . .

530 U.S. at 717-718 & footnote 25; emphasis added.

The law requires proximity for a person to be captive or intruded-upon. There is no reason this should be any different as to a funeral, private or public.

> While it is reasonable to view noisy, disruptive, and harassing protests as invasive, peaceful protest laws restrict all protests regardless of whether they are noisy or disruptive. They prohibit activities such as a small group of people or a lone protestor quietly holding signs or distributing leaflets near a church or cemetery. Such protestors neither physically nor aurally invade a funeral ceremony; nor do their protests amount to the harassing behavior required to constitute an "invasion" at common law.

> Peaceful protests, therefore, are not an intrusion when they are conducted immediately outside of the church or cemetery, much less if protestors stand 500 feet away.

Wells, *infra* note 19, at 183-184.

When federal courts have reviewed funeral picketing laws, they have not afforded the broad privacy interest Petitioner asserts, and have disallowed laws broadly designed to remove words out of sight of funeral-goers. E.g., *Lowden v. County of Clare, 2010 U.S. Dist. LEXIS 28993 (E.D.Mich. March 26, 2010)* (privacy interests not sufficient for provision against "adversely affect[ing]" funerals or 500-foot ban in every direction from funeral procession on public streets);[9] *Phelps-Roper v. Nixon, 545 F.3d 685 (8th Cir. 2008)* (preliminary injunction required against ban of pickets "in front of or about" funerals; no compelling interests in protecting individuals from unwanted speech outside of the residential context); *Phelps-Roper v. Strickland, 539 F.3d 356 (6th Cir. 2008)* (300-foot restriction reasonable to protect funeral attendees because conceivable picketers can still communicate their message to funeral attendees);[10] *McQueary*

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[9] Remember, the only place Petitioner claims he saw signs' tips was during the procession from the funeral home to church, which took place on public streets.

[10] If this law is applied to prohibit picketers getting their message to their intended audience, 300 feet may not be sufficiently narrowly tailored, because the law permits speakers reaching their intended audience, and any alternative to that is not ample. E.g., *Million Youth March, Inc. v. Safir, 18 F.Supp.2d*

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v. Stumbo, 453 F.Supp.2d 975 (E.D.Ky. 2006) (300-foot buffer zone not sufficiently tailored; provision barring visual and auditory displays overbroad, even assuming family privacy interest). Also note that Maryland's funeral picketing law fixes a distance of 100 feet, *see* Md.Code 10-205.

Petitioner relies on *National Archives and Records Administration v. Favish, 541 U.S. 157 (2004)* to ask this Court, for the first time, to grant a privacy right in a funeral.[11] *Favish* was about four photographs of a deceased. If the family had turned them over to *The New York Times* the outcome would have been different. (If a pro-abortion rally was conducted at an abortion clinic, it would get different treatment related to anti-abortion picketers.) And, if the photograph had been of a deceased soldier in times of war the outcome would have been different, because photographs of soldiers, dead or alive, are public.

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334 (S.D.N Y. 1998); *Dr. Martin Luther King, Jr. Movement, Inc. v. Chicago, 419 F.Supp. 667 (N.D.Ill 1976).*

[11] If the Court does recognize, for the first time, a privacy interest in a funeral (that was public and where picketers were over a thousand feet away out on the public right-of-way out of sight and sound), the verdict should still not stand on a newly-announced rule of law. *Morse v. Frederick, 351 U.S. 393, 409 (2007). Also see Miller v. California, 413 U.S. 15 (1973)* ("[W]hen constitutional rights are concerned – we should not allow men to go to prison or be fined when they had no 'fair warning,'" *418 U.S. at 42*).

The saga of photographs of the returning flag-draped tin caskets to Dover Air Force Base illustrates this point. In the past, the Department of Defense (DOD) restricted media access, citing families' privacy interests, and obligations to travel to Dover, which was upheld when several media and veterans' organizations challenged it in *JB Pictures, Inc. v. Department of Defense, 86 F.3d 236 (D.C.Cir. 1996). See*, MacNair, Scot A., "Is There a Right to View the Dead at Dover? JB Pictures v. Department of Defense: Limits on the Media's Right to Gather Information," *4 Vill. Sports & Ent. L.J. 387 (1997)*. Though "the image of caskets arriving at Dover became a staple of the nightly news," during the Vietnam War, the ban at Dover continued into the Iraq and Afghanistan wars. Zoroya, Gregg, "Return of U.S. war dead kept solemn, secret," *USA Today*, December 31, 2003, available at http://www.usatoday.com/news/nation/2003-12-31-casket-usat_x.htm.

But this changed. In 2005 the DOD was sued for denying images of memorial and arrival ceremonies based on privacy interests of soldiers and their families.[12] In April, 2005, the Pentagon released hundreds of previously secret images of casualties returning to honor guard ceremonies, "confirming that images of their flag-draped coffins are rightfully part of the public record,"[13] resolving the case.

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[12] *Begleiter v. Department of Defense, Case No. 1:04-cv-01697 (EGS)*, Complaint, Doc. No. 1, filed 10/04/04, paragraph 23; Answer, Doc. No. 2, filed 11/10/04, paragraph 23.

In February 2009, President Barack Obama announced he was revisiting the ban, and veterans and families were in favor. (E.g., family members and veterans called in to National Public Radio, during an interview with *Newsweek Magazine's* National Security Correspondent John Barry [who advocated for a Canada-like 100-mile heroes' highway for a "communal salute," instead of lifting the ban], all advocating removal of the ban.[14] On February 26, 2009, President Obama lifted the ban, to the praise of veterans groups, families and the public.[15] President Obama left the choice of media coverage to the families, and in March the Defense Department announced it would pay for families of fallen soldiers to travel to Dover to be present for the return of their deceased family member.[16] By October 2009, 75 percent of the families wanted the media present (60 percent all media; another 15 percent wanted only the DOD media present).[17]

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[13] "Return of the Fallen: Pentagon Releases Hundreds More War Casualty Homecoming Images," National Security Archive Electronic Briefing Book No. 152, April 28, 2005, available at http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB152/index.htm.

[14] "Rethinking Media Coverage of Fallen Troops," National Public Radio, February 17, 2009, available at http://www.npr.org/templates/transcript/transcript.php?storyid=100778246.)

[15] Harper, Jennifer, "Pentagon relaxes casket photo ban," *The Washington Times*, February 27, 2009, available at http://www.washingtontimes.com/news/2009/feb/27/us-relaxes-media-ban-on-casket-photos/. "Pentagon ends photo ban on war dead return," boston.com, February 26, 2009, available at http://www.boston.com/news/politics/politicalintelligence/2009/02/pentagon_report.html.

Photographs of injured and dead from war beyond the caskets at Dover are also public. In September, 2000, the DOD directed "open and independent reporting of U.S. military operations," through media pools and permitting journalists to ride on military vehicles and aircraft when possible. *Flynt v. Rumsfeld, 355 F.3d 697, 699-700 (D.C.Cir. 2004)*. This set the stage for unprecedented media access to the Iraq and Afghanistan wars. "The stationing of over five-hundred journalists within military units during Operation Iraqi Freedom represents the most recent round in this relationship and the largest expansion of the century-old practice of embedding," making it "'the most covered war in history,'" Smith, Kevin, "SURVEY OF BOOK: The Media at the Tip of the Spear: Embedded: The Media at War in Iraq. By Bill Katovskyn and Timothy Carlson," *102 Mich. L.Rev. 1329, 1331 (May, 2004)*. The embedding of reporters results in publication of images of the war dead. Such photographs have been published in this country, including dead and injured American soldiers, dead and injured soldiers of other nations, and dead and injured civilians, in the midst of ongoing public debate about how much should be published and whether American reporters are more willing to publish the war dead of other nations than of Americans.[18]

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[16] Seelye, Katharine Q., "Pentagon Will Help Families Travel to Dover," *The New York Times*, March 19, 2010, available at http://thelede.blogs.nytimes.com/2009/03/18/pentagon-will-help-families/.

[17] Davenport, Christian, "With ban over, who should cover the fallen at Dover?" *The Washington Post*, October 24, 2009, available at http://www.washingtonpost.com/wp-dyn/content/article/2009/10/23/ar2009102301828.html.

Applying *Favish* to photographs of dead soldiers would lead to a different outcome. In *Showler v. Harper's Magazine Foundation, 222 Fed.Appx. 755, 2007 U.S.App. LEXIS 7025 (10th Cir. 2007), cert. denied, 552 U.S. 825 (2007)*, the father and grandfather of a member of the Oklahoma National Guard killed in Iraq, sued a photojournalist and publisher for publishing a photo of the deceased soldier as he lay in his coffin during his funeral, claiming invasion of privacy and IIED. The Tenth Circuit Court of Appeals upheld an order granting summary judgment, in spite of *Favish*, because the event and photograph were public, with the soldier's open-coffin exposed to 1200 people, in a public funeral in the local high school.

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[18] Robertson, Lori, "Images of War," *American Journalism Review*, October/November 2004, available at http://www.ajr.org/article_printable.asp?id=3759; Kamber, Michael and Arbango, Tim, "4,000 U.S. Deaths, and a Handful of Images," *The New York Times*, July 26, 2008, available at http://www.nytimes.com/2008/07/26/world/middleeast/26censor.html; Moran, Rick, "NY Times Complains: 'Not enough dead soldiers,'" *American Thinker*, July 26, 2008, available at http://www.americanthinker.com/printpage/?url=http://www.americanthinker.com/blog/2008/07/ny_times_complains_not_enough.html; Arnow, Pat, "Where Have All the Bodies Gone?" *Fairness & Accuracy in Reporting*, July/August 2005, available at http://www.fair.org/index.php?page=2625.

> We agree with Defendants that Plaintiffs opened up the funeral scene to the public eye and cannot, therefore, establish that Defendants disclosed private facts by publishing the Turnley Photo. The local newspaper notified the public in advance of the time and place of Sgt. Brinlee's funeral, and it was held in a high school gymnasium to accommodate the large crowd expected to attend. Governor Henry spoke at the funeral, which was attended by 1200 people. Most attendees exited the funeral by first filing past Sgt. Brinlee's open casket. Numerous area newspapers published stories about Sgt. Brinlee's death and funeral. These facts belie the notion that the Turnley Photo revealed information that was private and summary judgment was appropriate on this claim.

222 Fed.Appx. at 764-765.

Going beyond photographs, in *Favish* this Court said family members have the right to direct and control disposition of the body of the deceased, *541 U.S. at 167*. The Court also said family members have a personal stake in honoring and mourning their dead and objecting to unwarranted public exploitation that, by intruding upon their own grief, tends to degrade the rites and respect they seek to accord to the deceased person who was once their own. In quoting from *Schuyler v. Curtis, 147 N.Y. 434, 447, 42*

N.E.22, 25 (1895), the Court referred to the right of the living against improper interference with the character or memory of a deceased relative.

The question is whether this language establishes a privacy right in a funeral under the facts and circumstances of this case. This language indicates a possible privacy right in disposition of the body. As discussed at footnote 2, *supra*, the right to dispose of the body also includes the right to have a private funeral. The right to decide whether to cremate the body; open the casket; have the body at the funeral; bury the body at a specific location; etc., does not equal a privacy right in a funeral. The purpose of the funeral is not disposition of the body. This body-disposition right may include the right to have a private funeral, and in that event a privacy interest could be found. But by no process of logic does the body-disposition right lead to a per se privacy interest in a funeral, no matter how public. Thus, if the funeral in this case was public, it cannot be said to be an event in which Petitioner would have a privacy right.

The only other privacy right articulated by the Court was the right to have a good memory of the deceased. Establishing a privacy right in a funeral (private or public) on the basis of the interest of a surviving family member in cherished memories would be grossly under inclusive. Many things could impact how a person remembers a deceased loved one above and beyond whether or how a funeral is conducted. A rule of law giving a privacy right at the expense of words, which are not proven as false, because of a subjective claim of outrage, would implicate all of the concerns this Court has raised, as discussed above, about breathing room for free speech. (This is an entirely different scenario than, for instance, dragging a dead body through the streets, as referenced by the Court in ***Favish***. That scenario is a non-speech example of protecting the memory of the deceased.) Attaching liability to words is particularly constitutionally-dangerous where, as here, the impact is to force a dissenting religious group in a little church to show what society deems "respect" for the deceased, when the church does not doctrinally agree.[19] The Amicus Brief for Veterans of Foreign

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[19] A subculture is "a cultural group within a larger culture, often having beliefs or interests at variance with those of the larger culture," *Compact Oxford English Dictionary,* available at http://www.askoxford.com/concise_oed/subculture?view=uk. Fundamentalists who believe the Bible became characterized as a religious subculture, and then mainstreamed, Sheler, Jeffery L., "Nearer My God To Thee," *U.S. News & World Report*, Vol. 136, No. 15, May 3, 2004, p. 58(7). WBC has been identified as a religious subculture, "Social control and the Westboro Baptist Church: Fuel to the fire?" Powell-Williams, Todd. Proquest Dissertations And Theses 2008. Section 0209, Part 0318 267 pages; [Ph.D. dissertation]. United States – Illinois: Southern Illinois University at Carbondale; 2008. Publication Number: AAT 3342317, available at http://proquest.umi.com/pqdlink?Ver=1&Exp=06-29-2015&FMT=7&DID=1674089181&RQT=309&attempt=1&cfc=1, and has not mainstreamed. "[A]lthough privacy and free speech law in the United States embrace notions of human dignity, they do not recognize a concept of dignity that requires an outward showing of respect enforced through law," Wells, Christina E., "Privacy and Funeral Protests," *87 N.C.L. Rev. 151, 182 (December 2008).*

Wars, at p. 2, states as its mission having the entire Nation mourning for dead soldiers. WBC does not desire to join the nation in this public mourning, but should not be penalized for declining when joining the public debate about dying soldiers and their funerals, that is taking place in direct connection with their funerals (by subject matter and by location/platform).

Liability in this case would, essentially, carve out a category of speech based on viewpoint, and strip it of constitutional protection, simply because society dislikes (or deems valueless or unnecessary) speaking ill of the dead (especially if the dead is a soldier). "As a free-floating test for *First Amendment* coverage, [that proposal] is startling and dangerous. The *First Amendment's* guarantee of free speech does not extend only to categories of speech that survive an ad hoc balancing of relative social cost and benefits. . . ." *United States v. Stevens, 2010 U.S. LEXIS 3478 at 17-18 (U.S. April 20, 2010)*. This is what Petitioner seeks – treating speech that speaks ill of the military-dead or is subjectively deemed outrageous to mourners of the military-dead as unprotected. The Court should decline to carve out such a "novel" exception that is "highly manipulable," *2010 U.S. LEXIS 3478 at 21*. If the *First Amendment* will not protect the dissenting views of a religious subculture, there is little point in this Republic, which purports to have a rule of law codified chiefly in the *First Amendment* that protects the minority from majority or mob rule.

The privacy right the trial court recognized was found in Petitioner's mourning, witnessed by the trial court saying when denying post-trial motions that Petitioner's privacy was invaded when he saw news stories about the picket; and by the trial court setting the time frame for liability-exposure from the funeral up to the day of the epic. This broad privacy zone goes well beyond the funeral, and any alleged invasion is premised exclusively on words and viewpoint. Permitting words to serve as the basis for attaching liability for invasion of privacy into a subjectively-defined and vague mourning privacy bubble is utterly out of bounds under the *First Amendment*, especially when the only intrusion claimed are not-proven-false words on public issues in public places. The right claimed in *Schuyler* was to not have the memory of the deceased degraded. Entertaining a claim of degraded memory on not-proven-false words would run afoul of the *Falwell* rule, that the *First Amendment* disallows tort liability attaching without falsity and fault on a subjective claim of outrage. That should be true whether the words were about the living or the dead. Plus not a single exhibit, witness, or fact supports the slightest hint of degradation to the memory of Matthew Snyder. WBC is roundly despised and vilified, and not a single soul has indicated having a lower regard for Petitioner or his son by virtue of WBC's words – indeed the *opposite* is true (the more attention this case has gotten, the more heroism has been attributed to Matthew Snyder and his father). The rule of law proposed would choke and stifle important free speech rights, and is unwarranted on the facts of this case. *See* Volokh, "Freedom of Speech and the Intentional Infliction of Emotional Distress Tort," forthcoming *Cardozo L. Rev. de * novo,* Summer 2010, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1628319.

The request here is to carve out this speech-exception for words, premised upon a claim that funerals are private. Again, funerals are not historically or by nature private events, but are most commonly held in the presence of and for the public.[20] The public viewing of the dead has become "a desired moment for many Americans over the course of the nineteenth century,"[21] though it was believed by many to be a pagan practice.[22] With time, objection faded,

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[20] Ashenburg, Katherine, *The Mourner's Dance: What we do When People Die*, North Point Press: New York, 2002, at 54-57. And *see*, "Early Funeral Customs," *DeathCare(.com)*, available at http://www.deathcare.com/2009/early-funeral-customs.html.

[21] *See* Laderman, Gary, *Rest in Peace: A Cultural History of Death and the Funeral Home in Twentieth-Century America*, Oxford University Press: New York, 2003, at 514. *See* "Funeral Industry," *Encyclopedia of Death and Dying*, available at http://www.deathreference.com/En-Gh/Funeral-Industry.html, at p. 3

[22] There are examples in the Scriptures of the dead being "subjected to anti-ideal treatments," which form WBC's belief against worshiping the dead. *See* Stavrakopoulou, Francesca, "Gog's Grave and the Use and Abuse of Corpses in Ezekiel 39:11-20," *Journal of Biblical Literature 129, No. 1 (2010), pp. 67(17), at p. 69* ("To this list of illustrations of the 'anti-ideal' in Ezekiel might also be added 24:16-24 in which the prophet obeys the divine command not to perform mourning rituals in response to the death of his wife . . . "). *Also see* Leviticus 10:1-6 (When Aaron's sons, Nadab and Abihu, were immediately struck dead for offering strange fire, God said to pick them up by their coats and carry them out of the camp. "Uncover not your heads, neither rend your clothes; lest ye die," v. 6.) And Numbers 6

(Continued on following page)

and public funerals became a mainstay, with increasing memorialization online today.[23]

We are a nation of public mourners, witnessed by the reaction to the deaths of Senator Robert Byrd (where President Obama spoke at his funeral), Michael Jackson, Heath Ledger, Princess Diana, Elvis Presley, Pope John Paul II, Presidents Ronald Reagan, John F. Kennedy and Abraham Lincoln, as a few examples. Spontaneous shrines are commonplace;[24] and public memorials threaten to take over public protest space on the Washington Mall.[25]

Soldiers' deaths prompt intense public reaction. "While national publications and Web sites continue to report the rising death toll of U.S. soldiers in Iraq as mere numbers . . . , it's a different story for small-town newspapers when the bodies come home for the funerals and memorials that follow. Here, the task of reporting details that go well beyond name, rank, and cause of death becomes a crucial responsibility. 'If

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(Nazarite forbidden to touch dead bodies). "Jesus said . . . Let the dead bury their dead . . . ," Luke 9:60.

[23] DeVries, Brian and Rutherford, Judy, "Memorializing Loved Ones on the World Wide Web," *OMEGA: Journal of Death and Dying*, Vol. 49, No. 1, 2004, p. 5(21).

[24] James, Caryn, "Good Grief: The Appeal of Public Sorrow," *The New York Times*, June 10, 2004, available at http://www.nytimes.com/2004/06/10/arts/critic-s-notebook-good-grief-the-appeal-of-public-sorrow.html.

[25] Benton-Short, Lisa, "Politics, Public Space, and Memorials: The Brawl on the Mall," *Urban Geography*, Vol. 27, No. 4, May 16 – June 30, 2006.

there's a [local] fatality in Iraq for any reason, it's usually front-page news,'" Moore, Sonya, "Bringing the war home," *Editor & Publisher*, Vol. 137, No. 3, March 2004, p. 5(2).

Thousands of stories have been written about soldiers' funerals; and they have become high profile events, with thousands inside and out with flags and signs, lining streets, highways, sidewalks, and front-door steps, everyone commenting on the soldier, his death, the funeral, and the war.[26] Media coverage of soldiers' funerals at Arlington National Cemetery has also been in the news; nearly two-thirds of the families opt for media coverage.[27]

Petitioner's son's funeral was a public event. He was able to go to and leave the funeral without any slightest disruption or interference. He was not captive, to the event or to the WBC. WBC was out of sight and sound; maintained a very reasonable distance; acted peacefully and engaged in no disruption or intrusion. Petitioner is not entitled to assert a privacy claim, because there was no intrusion. This is the wrong case to decide whether there is a privacy interest in a funeral.

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[26] As a few recent example *see* DiNapoli, Jessica, "Hundreds mourn Shelter Island fallen soldier," *27east*, June 15, 2010, available at http://www.27east.com/story_detail.cfm?id=283611&town=Shelter%20Island&n=Hundreds%20mourn%20Shelter%20Island%20fallen%20soldier; Kusmer, Ken, "Soldier was 'free spirit,' champion wrestler," *The Associated Press*, October 27, 2009, available at http://militarytimes.com/valor/army-sgt-dale-r-griffin/4350697/; Barber, Rex, "Laid to rest: Airman White honored by military in ceremony at VA," *Johnson City Press*, June 25, 2010, available at http://www.johnsoncitypress.com/News/article.php?ID=78056 .

[27] *See* McMichael, William H., "Media access to funerals allegedly discouraged," *ArmyTimes*, August 11, 2008, available at http://www.armytimes.com/news/2008/08/mlitary_arlington-media coverage_080408p/.

IV. PETITIONER'S INVASION OF PRIVACY CLAIM MUST FAIL BECAUSE WESTBORO BAPTIST CHURCH DID NOT INTERFERE WITH OR DISRUPT THE PUBLIC FUNERAL OF HIS SON IN ANY MANNER, SO IT IS NOT NECESSARY TO WEIGH WESTBORO BAPTIST CHURCH'S RIGHT TO ENGAGE IN RELIGIOUS SPEECH AGAINST ANY RIGHT THE COURT MIGHT EVER FIND TO AN UNDISRUPTED PUBLIC FUNERAL.

Petitioner presents the Court with false alternatives, saying his right to conduct his son's funeral should outweigh WBC's right to engage in religious speech. Whatever right Petitioner had to assemble and engage in religious rituals was fully protected and completely unfettered. WBC, a non-government entity, cannot interfere with Petitioner's constitutional rights. The Constitution is a document that binds the government. Perhaps if the government had declined to ensure the peace was kept on March 10, 2006, Petitioner would have a complaint against the government for interfering with his right to assemble and engage in religious ritual. (In fact the police had a modest presence, preventing any threat to the peace. Petitioner has complained about that fact throughout this case.)

The constitutional rights of these parties peacefully co-existed on March 10, 2006, and all days before and after. WBC did not attempt in any slightest measure to stop Petitioner from assembling or engaging in religious worship or ritual. There was no intrusion of any kind into the service or church by WBC. Well beyond what any federal or state statute, in Maryland or otherwise required, WBC regulated its time, place and manner of picketing, reasonably, and ensured it did not disrupt any planned activity, ingress/egress, or tranquility.

Cases like *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, 515 U.S. 557, 132 L.Ed.2d 487 (1995),* establishing that a speaker has a right to be free from state interference and autonomy to choose what not to say, might translate in our scenario to a requirement that law enforcement stop someone from going into the church in a disruptive manner, and that seems reasonable. What is *not* reasonable is to suggest that Petitioner's right to go into the church building and participate in a religious ritual somehow clashes with or must be balanced against WBC's right to be out on a public easement over a thousand feet away engaging in religious speech on public issues. *See Coalition v. Kempthorne, 537 F.Supp.2d 183, 204-205 (D.C.D.C. 2008)* (court rejected government's argument that groups could be barred from demonstrating on Pennsylvania Avenue during Inauguration to protect rights of groups or individuals obtaining permits from intrusion or interference, because Inauguration is a public event, and groups wanted to protest on public sidewalks, not physically intrude into another's event to interject their own convictions or beliefs).

◆

CONCLUSION

This verdict cannot be reinstated without upsetting the Constitution and existing jurisprudence dramatically. Petitioner and the Amicus Brief for the Senators propose a rule of law that treats speech subjectively characterized as "outrageous," *worse* than false speech. That is the *opposite* of what this Court's cases instruct. Constitutional protection is given to words when they are claimed to be false. Here, the effort to prove falsity failed. These words deserve *more* protection than words proven false.

The content, form and context show that WBC's speech was public-issue speech, highly disliked, and needing protection. A massive public discussion is underway in this nation – about the wars; the soldiers; their deaths; and their funerals. *Everyone* is using the occasion of the soldiers' deaths to comment, about the policies of this nation. WBC joined that discussion, on the same sidewalks where others were standing engaged in the discussion; and in the same airwaves that are thick with the discussion. They offered a viewpoint that everyone hates, with a pure motive of warning people of the consequence of sin (now and hereafter), using the same public platform, and the only basis for the verdict based on these words was angry disagreement with viewpoint.

Funerals are not private in any culture. Least of all are soldiers' funerals private – they are the essence of public in every feature. Any family that wants to preserve the privacy of the funeral, can declare it private, and decline to talk to the media, without any limit on their ability to mourn and have a funeral. There is no sound legal basis for outlawing (by penalty) words about dead soldiers and their funerals and families, in the context of the public discussion about war and dying.

No harm occurred to Petitioner that the law should compensate. The death of his son was tragic and sorrowful, and WBC's goal is to prevent more of them. Shutting up words about funerals or in connection with funerals will not take away that sorrow. It will, however, demonstrate to the world that this Republic can survive crush video, pornography, racial speech, burning flags, and vulgar speech of every kind – but cannot survive words about the sins of this nation.

WBC stayed well within the bounds of the law, self-regulating while engaging in public speech not proven false. WBC did not make anyone captive to their words; and public funerals for dying soldiers do not create captive audiences. The fact the speech was hyperbolic, figurative, and hysterical is why it should be protected. Its content, form and context reflect it is opinion about current events and the essence of the kind of robust speech on critical public issues for which the *First Amendment* was written. One writer has suggested there is enough support against WBC's speech that a funeral picketing amendment to the Constitution might be in reach. McAllister, *supra*, at 579. The Senators and Attorneys General joining by amicus briefs supports this suggestion. If the nation wants to thusly amend the Constitution, so be it; but the *current* Constitution does not allow this verdict to stand. The Fourth Circuit's decision to set aside the verdict should be affirmed.

Respectfully submitted,

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BRIEF

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IN THE
Supreme Court of the United States

ALBERT SNYDER,

Petitioner,

v.

FRED W. PHELPS, SR., *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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ARGUMENT

This case is about the intentional targeting of a grieving father by attention-seeking strangers. It is not solely about those strangers' First Amendment rights. Rather, as explained in Mr. Snyder's opening brief, the case requires this Court to balance the Phelpses' interest in engaging in tortious expressive conduct against the countervailing interests of Mr. Snyder, as both target and captive audience, and the State of Maryland. The Fourth Circuit erred by failing to conduct this balancing, leaving Mr. Snyder without remedy for the harm he suffered.

In their responses, the Phelpses and their supporting *amici* posit several arguments based neither on the record evidence nor this Court's precedent. First, they treat the facts as if the jury had found in the Phelpses' favor, mischaracterizing their disruptive effect on the funeral, the harm they caused Mr. Snyder, and the nature of the speech involved in their tortious conduct. Second, ignoring the requirement that a victim's public or private figure status is determined at the moment the tort is committed, the Phelpses cite Mr. Snyder's response to their harassment as evidence that he is a "public" figure to whom *Hustler*'s falsity requirement applies. Third, the Phelpses used Mr. Snyder's name in connection with hateful epithets, purportedly to express beliefs on matters unrelated to him. Yet the Phelpses and their *amici* disregard Mr. Snyder's status as the subject and target of the Phelpses' expressive conduct and treat him as if he were a mere "listener" who disagreed with or was offended by the Phelpses' speech. Fourth, the Phelpses make a misguided "viewpoint discrimination" argument, suggesting that Mr. Snyder's choice to sue them and not others who protested at the funeral is somehow akin to selective enforcement of an ordinance. Finally, several of the *amici* contend that this Court should permit the Phelpses to take advantage of purported procedural errors committed by the District Court, despite the fact that these purported errors were both harmless and invited by the Phelpses.

In sum, the Phelpses and their *amici* mischaracterize the jury verdict in this case as an expansion of tort liability at the expense of the First Amendment. The record and the relevant caselaw, however, demonstrate that they have it backwards. While Mr. Snyder merely seeks to recover for harm caused by the Phelpses' intentionally targeted harassment, the Phelpses and their allies seek an expansion of the First Amendment beyond the reasonable limits recognized by this Court. No such expansion is warranted.

I. The Phelpses and Their *Amici* Mischaracterize the Record and the Nature of the Speech at Issue.

The Phelpses and their *amici* have cherry-picked evidence favorable to their position—that the protesters did not "disrupt" the funeral service itself, that they stayed over 1,000 feet away, that Mr. Snyder did not see them until later in the day on television—while ignoring contrary evidence that the jury apparently credited—that the funeral planners rerouted the procession to avoid the Phelpses, that the Phelpses turned the funeral into a circus, that Mr. Snyder saw them during the funeral procession from a distance of approximately 200–300 feet. Indeed, the entire basis of the Phelpses' First Amendment defense is that they were discussing issues of public concern, including homosexuals in the military and the scandals involving the Catholic Church. Many of the Phelpses' signs and the Epic, however, failed to mention these or any other public issue. And Mr. Snyder presented evidence that the signs and Epic *were not about these issues* at all. By characterizing as "undisputed fact" their one-sided version of events and their subjective interpretation of the speech at issue, the Phelpses and their supporters urge this Court to usurp the jury's fact-finding role.

A court generally may overturn a jury verdict only if it finds "that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue." *See, e.g.*, Fed. R. Civ. P. 50(a). In reviewing a jury verdict, therefore, courts "review the evidence in the light most favorable to the prevailing plaintiff to determine if the evidence permits a reasonable jury to find in favor of the plaintiff on any permissible theory." *Howard v. Antilla*, 294 F.3d 244, 249 (1st Cir. 2002). Jury determinations on credibility and the appropriate weight afforded to specific evidence must remain undisturbed. *See Kapelanski v. Johnson*, 390 F.3d 525, 530 (7th Cir. 2004).

The First Amendment provides a limited exception to these general principles. In this context, an appellate court may review the record to ensure "that the speech in question actually falls within the unprotected category and to confine the perimeters of any unprotected category within acceptably narrow limits in an effort to ensure that protected expression will not be inhibited." *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 505 (1984); *see also New York Times v. Sullivan*, 376 U.S. 254, (1964) (noting that the "Court's duty is not limited to the elaboration of constitutional principles" but "must also in proper cases [include a] review [of] the evidence to make certain that those principles have been constitutionally applied").[1] The Court has also affirmed, however, that there are numerous findings of fact "that are irrelevant to the constitutional standard of *New York Times Co. v. Sullivan*, and to which the clearly-erroneous standard . . . is fully applicable." *Bose*, 466 U.S. at 514 n.31; *see also id.* at 499–500 (noting that "due regard" must be given to the fact-finder's opportunity to observe the demeanor of witnesses). In a defamation case, for example, only those facts related to the critical and often determinative finding of "actual malice" must be "independently assessed" by a reviewing court. *Id.* at 514 n.31. And even the Court's "independent review is subject to limitations and is not equivalent to *de novo* review of the entire record." *Howard*, 294 F.3d at 249 n.8. The Court "accepts the jury's determination of at least the necessarily found controverted facts, rather than making an independent resolution of that conflicting testimony," and then ensures that the appropriate constitutional principles have been applied. *See Harte-Hanks Commc'ns Inc. v. Connaughton*, 491 U.S. 657, 698 (1989) (Scalia, J., concurring).

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[1] The American Center for Law & Justice's citation to *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995), in this context is misplaced. That case involved a reevaluation of the threshold question of whether the conduct at issue—refusal by the petitioner to permit gay and lesbian groups to march as part of a public parade—was expressive conduct, at all. 515 U.S. at 567. In contrast, here, it is undisputed that the Phelpses' conduct, at least in part, was expressive; the jury simply refused to accept the Phelpses' version of the surrounding factual circumstances.

The Phelpses ignore these principles and attempt to re-litigate the facts. They suggest that Mr. Snyder was not harmed by their conduct, but the trial evidence demonstrated that their conduct interfered with Mr. Snyder's grieving process, caused him to vomit, and exacerbated his diabetes and his depression. (*Compare* Resp'ts' Br. 10 *with* Vol. VII at 1988 Vol. VIII at 2130, 2139 & 2145 *and* Vol. X at 2578.) The Phelpses and their supporting *amici* argue that there was no disruption of the funeral, but evidence was presented that the funeral procession had to be rerouted to avoid the Phelpses' presence and that the Phelpses turned the funeral into a circus. (*Compare* Resp'ts' Br. 6–7, Br. for The Thomas Jefferson Center of the Protection of Free Expression *et al.* as *Amici Curiae* Supporting Resp'ts (hereinafter "Thomas Jefferson Ctr. Br.") 12–13, *and* Br. for Scholars of First Amendment Law as *Amici Curiae* Supporting Resp'ts (hereinafter "Scholars Br.") 13 *with* Vol. VII at 2082 *and* Vol. VIII at 2250–2251, 2254–2255.) The Phelpses and their supporting *amici* assert that the Phelpses stood over 1,000 feet away from the funeral at all times, but Mr. Snyder presented evidence that, even after adjusting the funeral route, the Phelpses stood only 200–300 feet away from the funeral procession at the main entrance to the church property. (*Compare* Resp'ts' Br. 7 *with* Vol. VII at 2079, 2141 *and* Vol. VIII at 2244.) The Phelpses and their supporting *amici* assert that Mr. Snyder did not see the protesters except on television, but Mr. Snyder testified that he saw them as he traveled from the viewing to the funeral and, of course, he knew the Phelpses were there because they had announced their intention to interlope well in advance. (*Compare* Resp'ts' Br. at 7, 9, 17, Thomas Jefferson Ctr. Br. 10, Scholars Br. 4,13, Br. for Reporters Committee for Freedom of the Press *et al.* as *Amici Curiae* Supporting Resp'ts (hereinafter "Reporters Committee Br.") 8, Br. for American Civil Liberties Union *et al.* as *Amici Curiae* Supporting Resp'ts (hereinafter "ACLU Br.") 4, 12, *and* Br. for Foundation of Individual Rights in Education *et al.* as *Amici Curiae* Supporting Resp'ts (hereinafter "FIRE Br.") 26 *with* Vol. VIII at 2144, 2194.)

With respect to each of these factual disputes—all of which involve questions of pure historical fact based solely on evaluations of witnesses' credibility—the jury sided with Mr. Snyder and found that the Phelpses' conduct toward Mr. Snyder made them liable for intentional infliction of emotional distress and invasion of privacy under Maryland law. To revisit these findings without any deference would essentially render juries purposeless in any case that arguably implicates the First Amendment.

Even the foundation of the Phelpses' First Amendment defense relies on their asking this Court to revisit a factual determination made by the District Court and, incidentally, again by the jury—namely, that many of the Phelpses' signs and much of the Epic did not pertain to issues of public concern.[2] Indeed, the Fourth Circuit acknowledged that some of the signs, including the statements "God Hates You"[3] and "You're Going to Hell," had no relation to any matter of public concern. *Snyder v. Phelps*, 580 F.3d 206, 224 (4th Cir. 2009). And both the Phelpses and their expert conceded that the Snyders were "the target of [the Phelpses'] attacks and that many of their signs "referred to" the Snyders and were "directed at" and "personal" to them. (Vol. IX at 2333, 2366; Vol. X at 2572, 2618, 2630.)

Particularly in the context of the funeral for Matthew Snyder—who was not gay, who had no involvement in the scandals involving the Catholic Church, and who had no influence on or known opinion about these issues—it was far more likely that the signs were not about these public issues but were, instead, targeted, harassing epithets intended to cause the kind of harm tort law is designed to remedy. *See Rosenfeld v. New Jersey*, 408 U.S. 901, 902 (1972) (Berger, J., dissenting) ("When we undermine the general belief that the law will give protection against fighting words and profane and abusive language . . . we take steps to return to the law of the jungle."). This conclusion is further supported by the signs' and Epic's repeated use of the Snyders' names and the word "you" and Fred Phelps, Sr.'s admission that he began protesting military funerals after unidentified military personnel allegedly assaulted his son.[4] (Vol. VIII at 2226.) As set forth in Mr. Snyder's opening brief at Part I.B, this harassment should not be entitled to First Amendment protection.[5]

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[2] As discussed further *infra*, any error caused by the trial judge's decision to instruct the jury on First Amendment issues—after first determining himself that the Phelpses' signs were not protected by the First Amendment—was both harmless and invited by the Phelpses. Therefore, no remand is warranted on this ground. *See infra* Part V.

[3] The ACLU points out that the back of the "God Hates You" sign said, "God Hates America." (ACLU Br. 16.) Since only one side of the sign would have been visible at any given time, it is unclear how anyone other than the Phelpses was supposed to understand that "You" referred "to the nation as a whole" rather than to "Petitioner or any one specific individual," as the ACLU claims. (*Compare id. with* Vol. VII at 2086–2087 *and* Vol. VIII at 2113, 2119, 2121.)

The Phelpses respond that a speaker's motives are irrelevant to the determination of whether the First Amendment protects his or her speech. Here, however, the Phelpses' subjective interpretation of their signs and the Epic is the only evidence that they relate to matters of public concern. The signs and Epic say nothing about homosexuals in the military or the Catholic sex abuse scandal, nor did the context of their

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[4] According to the ACLU, Phelps testified only that his son's attack "convinced him that there were gays in the military and that [he] should begin protesting that issue." (ACLU Br. 16 n.6.) The jury, however, was free to reject that explanation and, instead, conclude from the admitted temporal proximity that revenge motivated Phelps.

[5] The ACLU argues that the Phelpses' speech was not "about" anybody. (*See* ACLU Br. 26 n.8.) This argument assumes that the Phelpses' subjective interpretation of their signs must be correct and ignores the repeated use of the Snyders' names and the word "you" as well as the admissions by the Phelpses and their expert that the signs "refer[ed] to" and were "personal" to the Snyder family. (Vol. IX at 2366; Vol. X at 2572, 2618, 2629.)

"protest" clarify their intended meaning. If the Phelpses had directed their conduct toward an outspoken supporter of gay rights, for example, or a politician or lobbyist with some influence on these issues, perhaps it would be reasonable to accept their interpretation. But they targeted their "message," instead, at Mr. Snyder, who had no connection to or influence over these issues. (*See also* Petitioner's Br. Part I.C.)[6] The Phelpses presented no evidence that either the Snyders or a neutral passerby would have understood their purportedly political message. The protected status of the protest and Epic, therefore, depends entirely on the credibility of the Phelpses' explanation for their conduct, and Mr. Snyder appropriately undermined this explanation with evidence that this conduct was targeted at the Snyders as revenge for an unrelated alleged assault in the past.

By the Phelpses' logic, the Court should grant "absolute" First Amendment protection even to obscenity or fighting words so long as the speaker can later ascribe a farfetched "political" meaning to it. Indeed, the Phelpses' sign depicting males engaging in anal intercourse was arguably obscene and, thus, not protected by the First Amendment. The Phelpses rely on an incredible leap of logic to explain that sign and many of the others as statements about issues of public concern. A person cannot shout "fire" in a crowded theater and later claim that he was trying to garner attention for fire safety issues or the inadequacy of the local fire department. *See F.C.C. v. Pacifica Found.*, 438 U.S. 726, 747 (1978) (noting that language which is "'vulgar,' 'offensive,' and 'shocking' . . . is not entitled to absolute constitutional protection under all circumstances"). Likewise, the Phelpses cannot stand outside Matthew Snyder's funeral hurling personal, targeted epithets and then later immunize their conduct by claiming that they were actually protesting the United States' tolerance of homosexuality or the supposed evils of the Catholic Church.

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[6] Indeed, in the view of the Fourth Circuit and several of the *amici*, the Phelpses' picketing and Epic would garner absolute protection even if it had been targeted at a non-military funeral. *See Snyder*, 580 F.3d at 222; (Reporters Committee Br. 18; FIRE Br. 18; ACLU Br. 12, 25). The Phelpses apparently are free to pick a deceased person's name at random out of any local newspaper and target his or her family thereafter, so long as they stick to epithets and rhetoric rather than factual statements.

In sum, the Phelpses seek to shield themselves from liability by changing the jury's factual findings and by ignoring the personal and targeted nature of their signs and Epic. The trial judge and jury did not accept the Phelpses' version of events, and their findings are supported by competent and sufficient evidence. This Court should not revisit their determinations. *Harte-Hanks*, 491 U.S. at 693.

II. Mr. Snyder is a Private Figure for All Purposes.

The Phelpses also argue that Mr. Snyder "wants exemption from the requirement of *Hustler* . . . that falsity and actual malice be shown to sustain an IIED claim against public speech." (Resp'ts' Br. 20.) The *Hustler* holding, however, is limited to public figures, and the Phelpses' argument that Mr. Snyder is a public figure is meritless.[7] *See* Rodney A. Smolla, *Emotional Distress and the First Amendment: an Analysis of Hustler v. Falwell*, 20 Ariz. St. L.J. 423, 466 (1988) (noting that the holding of *Hustler* is explicitly limited to public officials and public figures).

The *Gertz* Court recognized two "alternative bases" for designating a plaintiff as a public figure. First, "an individual may achieve such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 351–52 (1974). Second and "more commonly," a plaintiff becomes a public figure when he or she "voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues." *Id.* Mr. Snyder and his deceased son meet neither of these criteria.

"Absent clear evidence of general fame or notoriety in the community, and pervasive involvement in the affairs of society, an individual should not be deemed a public personality for all aspects of his life." *Id.* at 352. The Snyder family has no "general fame or notoriety." In fact, outside of the instant context, Mr. Snyder is completely unknown apart from his friends, family, and colleagues.

Nor did the Snyders "voluntarily inject" themselves into any public controversy. *Id.* at 351. The Phelpses cite the media attention garnered by Matthew Snyder's funeral and the interviews granted by Mr. Snyder as evidence that the funeral was not a "private" event. (Resp'ts' Br. 18, 32–33.) But the evaluation of a plaintiff's public figure status must be limited to the time at or before the tortious conduct, and a defendant cannot transform a private figure into a public figure by dragging him into the spotlight of a public controversy. *See Hutchinson v. Proxmire*, 443 U.S. 111, 135 (1979). The vast majority of Mr. Snyder's contact with the media occurred *after* the Phelpses' involvement in his son's funeral and then only to counter the negative attention thrown on him by the Phelpses. Accordingly, the more recent publicity received by Mr. Snyder is irrelevant to the public figure analysis. *See Foretich v. Capital Cities/ ABC, Inc.*, 37 F.3d 1541, 1558–59 (4th Cir. 1994) (noting that a plaintiff's public replies to a defendant's public accusations do not confer public figure status).

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[7] It is also a tacit acknowledgement that the Fourth Circuit misapplied the "actual malice" standard to expressive conduct targeting private figures.

Prior to the Phelpses' unwanted involvement in Mr. Snyder's life, Mr. Snyder received minimal media attention. He placed Matthew's obituary in the newspaper and gave brief quotations over the phone to two local newspapers that printed articles each time a local individual died in combat. (Vol. VIII at 2150.) The Phelpses suggest that this alone was sufficient to confer public figure status on Mr. Snyder. (Resp'ts' Br. 5–6.) The Phelpses further spend multiple pages noting that the wars in Iraq and Afghanistan have been "the most reported . . . in American history" and that military "funerals are highly publicized events" generally. (*Id.* 2–4; *see also id.* 46–52 (arguing that *Favish*'s recognition of a family's privacy right to photographs of deceased soldiers and to "a good memory of the deceased" is inconsistent with the public's interest in military issues).) The Phelpses' logic, however, would confer public figure status on every military family who loses a loved one in war and chooses to publish an obituary. This Court's jurisprudence neither commands nor invites such an absurd result.

Mr. Snyder's minimal contact with the media also undermines the argument that permitting liability in this case would open the floodgates to claims against media outlets and controversial commentators. For example, the Reporters Committee for Freedom of the Press suggests that the Phelpses' hateful epithets referring to and targeted at the Snyders is akin to Ann Coulter's criticism of the so-called "Witches of East Brunswick"—four outspoken widows of 9/11 victims who were heavily involved in the creation of the 9/11 commission. (Reporters Committee Br. 23.) But this example demonstrates precisely why Mr. Snyder should be protected. Coulter's targets, like Jerry Falwell in the *Hustler* case, sought to use their status and personality to influence policies and thereby opened themselves up to public criticism, including Coulter's charges of opportunism. In contrast, it is undisputed that Mr. Snyder never entered the political arena and had no relationship to the purported matters of public concern the Phelpses now claim they were protesting. Mr. Snyder had no capacity to "shape events" and was not "intimately involved in the resolution of important public questions." *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 51 (1988) (internal quotation marks omitted); *see also Wells v. Liddy*, 186 F.3d 505, 533–34 (4th Cir. 1999) (noting that public figure analysis requires determination of whether a plaintiff has attempted to influence the merits of a controversy or has drawn attention to himself in order to invite public comment). He merely wanted to bury his son in peace. Holding the Phelpses liable for disturbing that process would in no way expose to liability those, like Coulter, who criticize public figures.[8]

Finally, *Hustler*'s application of defamation law to intentional infliction of emotional distress claims makes sense only with respect to public figures. The *Hustler* Court explained that Falwell's intentional infliction of emotional distress claim was merely a defamation claim in disguise—that the real "harm" Falwell experienced was reputational. Mr. Snyder's situation is reversed: as a private figure, he has very little "public" reputation to protect, and the harm he experienced was primarily emotional—though, as noted above, he also experienced physical manifestations of harm.[9] Imposing a "falsity" requirement on his claim would, thus, be arbitrary and, as the American Center for Law & Justice observes, "would in effect constitutionally abolish the tort of intentional infliction of emotional distress by means of speech (or at least render it wholly redundant of the tort of defamation." (Br. of American Center for Law & Justice as *Amicus Curiae* in Support of Neither Party (hereinafter "ACLJ Br.") 8–10.)

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[8] Likewise, the fact that intentional infliction of emotional distress claims are rarely successful under Maryland law—a fact noted by the Thomas Jefferson Center (Thomas Jefferson Ctr. Br. 16–17)—undermines the argument that permitting liability here would open the floodgates on tort claims and chill protected speech.

[9] For this reason, the Phelpses' assertion that Mr. Snyder's reputation has benefited from the instant controversy while they have been vilified is of no moment. (*See* Resp'ts' Br. 18.)

III. This is Not a Pure Speech Case, and the Verdict Did Not Depend on Mr. Snyder's Subjective "Outrage."

The Phelpses spend considerable effort setting up the straw argument that Mr. Snyder "wants to equate his disagreement with words—no matter where, when, how, or in what form he saw them—with captive audience status." (Resp'ts' Br. 38; *see also id.* 36 ("Letting liability attach to not-proven-false words on public issues because a person subjectively claims to be outraged . . . would simply rip the *First Amendment* to useless shreds." (emphasis in original)); *id.* 52 (referring to Mr. Snyder's allegations as a "subjective claim of outrage"); *id.* 53 ("This is what Petitioner seeks—treating speech that speaks ill of the military-dead or is subjectively deemed outrageous to mourners of the military-dead as unprotected.").) But the Phelpses did not merely write a newspaper editorial, and the jury verdict did not depend on Mr. Snyder's subjective "disagreement with words" or his "outrage." Instead, the Phelpses engaged in *conduct*: they showed up uninvited to Matthew Snyder's funeral; they ensured media coverage of their protest by sending out a press release in advance; they created and displayed signs at the funeral depicting, among other things, two nude male figures engaging in anal sex; they created a website that referred to Mr. Snyder by name and alleged that he taught his recently-deceased son to "divorce" and "commit adultery." The jury found that this conduct met the elements of the state law tort claims at issue. Mr. Snyder's "subjective" reaction may have been relevant to whether he had suffered emotional harm as a result of the Phelpses' conduct, but it was not relevant to the inquiry of whether that conduct was extreme and outrageous under Maryland law.

The jury instructions further undermine the position of the Phelpses and their *amici* that the verdict was based solely on the content of the Phelpses' speech. (*See* Vol. XII at 3113–3114 ("The Defendants in this case claim that their actions were protected by the First Amendment of the United States . . . The government, including the courts, can place reasonable time, place, and manner restrictions on how protected speech may be expressed.").) The instructions focused on *acts*, and the Fourth Circuit should not have divorced the language contained in the Phelpses' signs and Epic from the manner in which they presented that language to Mr. Snyder.

The arguments of the *amici* that Mr. Snyder was merely an offended "listener" are equally misplaced. (*See, e.g.*, ACLU Br. 10; Reporters Committee Br. 4.) Rather, the Phelpses physically disrupted Matthew Snyder's funeral. They stationed their protest so that it would directly interfere with Matthew Snyder's funeral procession, and Mr. Snyder was forced to follow an alternate route to mitigate the interruption. The Phelpses also took deliberate steps to draw maximum attention to their activities, at the expense of the Snyder family. The characterization of Mr. Snyder as a mere listener does not square with the reality of the Phelpses' conduct.

The Phelpses argue that Mr. Snyder advocates a novel principle of law in which a speaker can be held liable for any speech that is "outrageous" or subjectively distressing to the listener. Mr. Snyder, however, seeks no exception to the protections provided by existing First Amendment doctrine. Rather, Mr. Snyder merely notes that the Fourth Circuit failed to give any consideration to the interest of Maryland in protecting his ability to recover, in tort, for the harm he suffered because of the Phelpses' harassment. Of course, Mr. Snyder does not deny that "outrageousness" is an element to the Maryland tort of intentional infliction of emotional distress. The jury, however, did not premise the Phelpses' liability merely on the subjective outrageousness of the Phelpses' conduct from Mr. Snyder's vantage point. Instead, the jury found that the Phelpses physically disrupted Matthew Snyder's funeral and targeted Mr. Snyder for harassment even though neither he nor Matthew had any rational connection with the Phelpses' purportedly religious message.[10]

Finally, the Phelpses admit that they seek absolute constitutional protection for all outrageous and intentionally harmful expressive conduct that does not include provably false statements—no matter the context or the relationship between the tortfeasor and the victim—urging that such protection is necessary and consistent with the First Amendment. (Resp'ts' Br. 35–36.) This position makes sense neither logically nor constitutionally. Encouraging harassers to escalate their rhetoric and to spout hateful epithets so that they can immunize themselves from liability undermines the purpose of tort law by encouraging victims to seek self-help. *See Rosenfeld v. New Jersey*, 408 U.S. 901, 903 (1972) (Burger, J., dissenting) ("[I]t does not unduly tax the imagination to think that some justifiably outraged parent whose family were exposed to the foul-mountings of the speaker would 'meet him outside' and either alone or with others, resort to the 19th Century's vigorous modes of dealing with such people."). And, as set forth above and in Petitioner's opening brief, imposing defamation's falsity requirement on other claims brought by private individuals is an entirely arbitrary means of distinguishing tortious-but-protected speech from speech which subjects the speaker to liability. (*See* ACLJ Br. 9–10 ("If anything, the exploitation of *truth* to inflict emotional harm—rejoicing maliciously in the death or suffering of another, for example—can hurt far worse than some vile but ultimately untrue accusation.").)

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[10] The Phelpses' own expert testified that there was no connection between their religion and the funeral protests in which they engaged. (Vol. X at 2606.)

IV. The Actions of Third Party Demonstrators at the Funeral are Irrelevant.

In an effort to suggest viewpoint discrimination and to bolster their meritless argument that Mr. Snyder is a public figure, the Phelpses note that multiple other groups showed up at Matthew Snyder's funeral in response to the Phelpses' presence. (Resp'ts' Br. 6, 41.) The Phelpses even go so far as to suggest that Mr. Snyder himself used the funeral as the opportunity to hold a "patriotic pep rally." (Resp'ts' Br. 41.) The presence of other groups, however, is irrelevant to whether the Phelpses are "absolutely" protected by the First Amendment.

As an initial matter, the Phelpses' argument is without factual support. Mr. Snyder has never claimed that he invited the other groups' presence at his son's funeral. Indeed, to the extent that they contributed to the circus-like atmosphere and interfered with Mr. Snyder's mourning process, they, too, invaded his privacy. Mr. Snyder's decision not to sue these individuals, however, is not akin to a municipality selectively enforcing an ordinance or a police department selectively arresting protesters who express a particular viewpoint. A plaintiff need not sue everyone who harms him, and his failure to seek tort liability from a particular group does not diminish the harm it may have caused. The "viewpoint discrimination" cases cited by the Phelpses, therefore, are inapposite. *See, e.g., A.N.S.W.E.R. Coal. v. Kempthorne*, 537 F. Supp. 2d 183, 204 (D.D.C. 2008) (granting summary judgment to plaintiff anti-war group who was denied a permit during Presidential Inauguration because National Park Service could not bestow preferential treatment on inaugural committee as compared with protesters).[11]

Moreover, the presence of the veterans groups and emergency personnel was caused by the Phelpses' actions. They likely would not have come had the

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[11] The Phelpses mischaracterize this case by suggesting that it stands for the proposition that protesters on public sidewalks do not "physically intrude into another's event to interject their own convictions or beliefs." (Resp'ts' Br. 60–61.) The case is also inapposite because the Presidential Inauguration was a public event and the protesters were discussing issues of public concern relevant to the President's policies.

Phelpses not chosen to target their hateful expressive conduct at the Snyder family. These groups were, thus, like firefighters who inadvertently cause water damage to property when putting out a fire; their actions may contribute to the harm suffered by the property owner, but they are not similarly situated with the arsonist.

V. The Court Need Not Remand this Case Because of Purportedly Faulty Jury Instructions.

Amici argue that, if Mr. Snyder's claims are not precluded as a matter of law based on the First Amendment, the District Court committed at least two errors warranting remand for a new trial: (1) permitting the jury to determine the constitutionally protected status of the Phelpses' speech and (2) failing to limit the jury's exposure to certain of the Phelpses' signs. These alleged errors, however, were both harmless and invited by the Phelpses. Accordingly, no remand is necessary.

With regard to the first alleged error, the advocates for remand neglect to mention that, prior to instructing the jury on the First Amendment, the District Court made its own determination that the Phelpses' speech and conduct did not fall within the scope of the First Amendment. The Phelpses moved for judgment as a matter of law on three separate occasions—after the presentation of Mr. Snyder's case, after the conclusion of the Phelpses' case, and at the conclusion of rebuttal testimony. *Snyder v. Phelps*, 533 F. Supp. 2d 567, 576 (D. Md. 2008). On each occasion, the Phelpses argued that the First Amendment barred Mr. Snyder's claims as a matter of law and the District Court made the legal determination that those claims were not so barred. (Vol. XII at 3113–3114.) The District Court thus fulfilled its duty of deciding whether the Phelpses' speech was protected by the First Amendment. Indeed, the jury instructions essentially added an extra element into Mr. Snyder's tort claims, prejudicing *him* rather than the Phelpses. The Phelpses cannot seriously complain about a jury instruction that offered them this additional measure of protection.

Moreover, even if the District Court offered an improper instruction concerning the First Amendment, it did so only at the Phelpses' invitation. Following the close of testimony and the denial of the Phelpses' third motion for judgment as a matter of law, the District Court requested proposed jury instructions from both parties. Mr. Snyder requested that the Court give no jury instruction concerning the First Amendment. The Phelpses, however, called for the Court to offer a lengthy instruction on the scope of the First Amendment. (Vol. XV at 3833–3834.) The Court's ultimate instruction was based on the Phelpses' proposal. (Vol. XI at 2877–2879.) The Phelpses therefore invited the alleged error in the jury instructions, and they cannot now cry foul. *See, e.g.*, *Harvis v. Roadway Express, Inc.*, 923 F.2d 59, 60 (6th Cir. 1991) ("[A] party may not complain on appeal of errors that he himself invited or provoked the court or the opposite party to commit."); *Krienke v. Ill. Cent. R.R. Co.*, 249 F.2d 840, 846 (7th Cir. 1958) ("A party cannot complain of an alleged error in instructions when the same error is found in its own instructions.").

Likewise, the second alleged error—that the District Court failed to limit the jury's exposure to certain of the Phelpses' signs—was both harmless and invited by the Phelpses. The most controversial signs were presented to the jury *by the Phelpses* when they played several videos, which included a montage of hundreds of signs that they had used at various protests. (*See* Vol. XV at 3796–3807 (Exhibits 41a-41f, titled, "Thank God for 911," "Thank God for IEDs," "Fag Troops," and "God Hates You," "You're Going to Hell," respectively).) It is unclear why the Phelpses chose to present these images to the jury, but, regardless of their motivation, they are now precluded from arguing that they have been prejudiced by the jury's exposure to these signs. *See All Am. Life & Cas. v. Oceanic Trade Alliance Council, Int'l, Inc.*, 756 F.2d 474, 479–80 (6th Cir. 1985) (refusing, on the basis of the invited error rule, to exclude otherwise inadmissible evidence because the plaintiff had invited witnesses to make the references it later sought to exclude).

CONCLUSION

For the reasons stated above as well as those set forth in Petitioner's opening brief, this Court should reverse the judgment of the Fourth Circuit.

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ALBERT SNYDER,

Petitioner,

v.

FRED W. PHELPS, SR., ET AL.,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Fourth Circuit

AMICUS BRIEF OF THE AMERICAN CENTER FOR LAW AND JUSTICE IN SUPPORT OF NEITHER PARTY

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INTEREST OF AMICUS[1]

The American Center for Law and Justice (ACLJ) is an organization dedicated to the defense of constitutional liberties secured by law.

The ACLJ often appears before this Court on the side of First Amendment free speech claims. *E.g., Schenck v. Pro-Choice Network of Western New York,* 519 U.S. 357 (1999); *Hill v. Colorado,* 530 U.S. 703 (2000); *McConnell v. FEC,* 540 U.S. 93 (2003). It has also appeared before this Court resisting specious free speech claims. *E.g., City of Pleasant Grove v. Summum,* 129 S. Ct. 1125 (2009).

This case is of special interest to the ACLJ both because it has potentially grave importance for the free speech jurisprudence governing classic First Amendment protest activities, and because this case requires considerable winnowing of First Amendment wheat from erroneous chaff.

The Reverend Fred Phelps and his followers present a sorry caricature of Christianity. Their gospel of hate and their deliberately cruel and exploitative tactics merit universal condemnation. Accordingly, the Phelpses' antics provide an understandable temptation to shave First Amendment doctrines in the interest of punishing extraordinarily distasteful speakers.

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[1] The parties in this case have consented to the filing of this brief. Copies of the consent letters are being filed herewith. No counsel for any party authored this brief in whole or in part. No such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity aside from the ACLJ, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. The ACLJ has no parent corporation, and no publicly held company owns 10% or more of its stock.

On the other hand, the Fourth Circuit, in its analysis of this case, pursued an erroneous line of reasoning, thereby in its own way damaging the integrity of First Amendment law. Petitioner Snyder, meanwhile, serves up his own platter of misguided legal arguments.

The ACLJ therefore files this brief in support of neither party in an effort to guide this Court around the constitutional potholes to a doctrinally sound decision.

STATEMENT OF THE CASE

Background

Marine Lance Corporal Matthew Snyder died while serving in Iraq. *Snyder v. Phelps,* 533 F. Supp. 2d 567, 571 (D. Md. 2008).

Cpl. Snyder's funeral was held in Westminster, Maryland. *Id.* There were supportive demonstrations from children attending a neighboring Catholic school and also from a group called the Patriot Guard Riders, a collection of motorcycle riders formed to outshine the protesters from the Westboro Baptist Church (WBC). Opp. at 6-7.

The WBC protesters, including Rev. Fred Phelps and two of his daughters, Shirley Phelps-Roper and Rebekah Phelps-Davis, had learned of Cpl. Snyder's funeral and had issued a press release announcing their intent to protest. 533 F. Supp. 2d at 571. At the protest, the WBC group carried various inflammatory signs attacking the U.S., the Marines, homosexuals, and the Catholic Church. *Id.* at 572.

Petitioner Albert Snyder, Cpl. Snyder's father, attended the funeral with his daughters. Opp. at 7. The WBC protesters were hundreds of feet away. *Id.* at 7, 9; Pet'r Br. at 4. Albert Snyder apparently did not see them at all (except perhaps the tops of their signs), 533 F. Supp. 2d at 572, 584, and the protesters, after having been there some 30 minutes, left before the funeral began, Opp. at 6. Snyder did see the protesters on TV later that day and became quite upset. 533 F. Supp. 2d at 572, 584.

The WBC thereafter posted on its website an "epic" naming Cpl. Snyder that consisted, *inter alia,* of an anti-Catholic and anti-divorce rant. *Snyder v. Phelps,* 580 F.3d 206, 225 (4th Cir. 2009); Pet'r Br. at 7-8. (Snyder is Catholic and is divorced from Cpl. Snyder's mother.) Snyder came across the "epic" when Googling his son, read the epic, and became further outraged. 533 F. Supp. 2d at 572.

District Court Proceedings

Snyder sued WBC, Phelps, and the two daughters who had joined Phelps at the funeral protest. *Id.* at 571-72. He brought five state-law claims in federal court under diversity jurisdiction: defamation, publicity given to private life, intentional infliction of emotional distress (IIED), intrusion upon seclusion, and civil conspiracy. *Id.* at 572. The district court dismissed the defamation and publicity claims on summary judgment, *id.*, and Snyder has not appealed that ruling, 580 F.3d at 213 n.3. The remaining claims -- IIED, intrusion, and conspiracy -- went to the jury. 533 F. Supp. 2d at 573. The district court instructed the jury, over the Phelpses' objection, as follows:

> You must balance the Defendants' expression of religious belief with another citizen's right to privacy and his or her right to be free from intentional, reckless, or extreme and outrageous conduct causing him or her severe emotional distress. . . . [Y]ou . . . must determine whether the Defendants' actions were directed specifically at the Snyder family. If you do so determine, you must then determine whether those actions would be highly offensive to a reasonable person, whether they were extreme and outrageous and whether these actions were so offensive and shocking as to not be entitled to First Amendment protection.

580 F.3d at 215 (quoting jury instruction).

The district court also refused to limit the jury's consideration to certain specific signs. *Id.* at 215 n.5.

The jury returned a verdict for plaintiffs on all three remaining tort claims, awarding $2.9 million in compensatory damages and $8 million in punitive damages. 533 F. Supp. 2d at 573. The district court remitted the punitive damages to $2.1 million, yielding a total award of $5 million, but otherwise declined to disturb the verdict. *Id.* at 597.

Decision on Appeal

The Fourth Circuit reversed.

As an initial matter, the court held that the district court erred by allowing the jury to decide the legal issue of the scope of the First Amendment (in the instruction quoted above). 580 F.3d at 221. That meant the Phelpses were at least entitled to a new trial. *Id.*

Next, the court held that a new trial was unnecessary because the speech in question was protected under the First Amendment. The court held that the signs and "epic" all involved a matter of public concern and consisted of rhetorical hyperbole, not statements with provably false factual connotations. *Id.* at 222-26.

Two judges formed the majority. Judge Shedd concurred in the result, stating that he would reverse on the grounds that Snyder failed to provide sufficient evidence to satisfy the elements of the relevant torts. *Id.* at 227.

Snyder's Petition for Certiorari

Snyder petitioned for certiorari, raising the following three questions:

> 1. Does *Hustler Magazine, Inc. v. Falwell* apply to a private person versus another private person concerning a private matter?
> 2. Does the First Amendment's freedom of speech tenet trump the First Amendment's freedom of religion and peaceful assembly?
> 3. Does an individual attending a family member's funeral constitute a captive audience who is entitled to state protection from unwanted communication?

Pet. at i.

This Court granted review.

Petitioner has now dramatically rewritten the Questions Presented. Pet'r Br. at i. However, under this Court's Rules, petitioner "may not raise additional questions or change the substance of the questions

0already presented," S. Ct. R. 24.1(a). Accordingly, amicus addresses the questions as presented in the petition.

SUMMARY OF ARGUMENT

The Fourth Circuit erred by imposing a constitutional requirement that the speech at issue here be provably false in order to be subject to tort liability. Such a requirement makes sense in defamation cases, or in cases -- like *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988) -- brought over false assertions. But there is no more warrant for constitutionally imposing such a requirement as a general matter in intentional infliction or intrusion suits than there would be to do so with other categories of unprotected speech, such as threats or fighting words. The decision below must therefore be vacated and the case remanded.

The Fourth Circuit was correct, however, to overturn the judgment of the district court on the basis of unconstitutionally faulty jury instructions. The district court left it to the jury to decide the scope of the First Amendment in this case. But the reach of the First Amendment is a matter of law (or mixed law and fact), not pure fact. At a minimum, then, this case has to be retried with proper limiting instructions.

This Court should reject petitioner Snyder's proposed constitutional analysis. His focus on the applicability of *Falwell* (Question 1)[2] is largely beside the point. The flaw in the decision below was its categorical importation of a *falsity* requirement from defamation law, not a failure properly to calibrate that misplaced requirement. Snyder's effort to pit the Phelpses' constitutional rights against his own constitutional rights (Question 2) founders upon the absence of state action. Private demonstrators like the Phelpses by definition cannot infringe Snyder's *constitutional* rights to free exercise or assembly. And the First Amendment precludes Snyder's invitation to expand the "captive audience" doctrine (Question 3) to swallow up orderly protests in public fora.

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[2] The references here are to the three Questions Presented in the Petition for Certiorari, not to the four, expanded, Questions set forth in the Brief for Petitioners. *See* S. Ct. R. 24.1(a).

The tort of intrusion upon seclusion cannot proceed in this case consistent with the right to free speech. Any "intrusion" here is no more than the mental effect of confrontational messages voiced in a public place.

In theory, a tort of intentional infliction of emotional distress might be predicated upon personally directed speech consisting of sheer, malicious rejoicing in the death or suffering of a loved one. The jury here, however, did not proceed under so limited a theory of liability; hence, the jury verdict and judgment in this case cannot stand.

This Court should vacate the decision below and remand with directions to vacate the district court judgment and send the case back for retrial with proper limiting instructions.

ARGUMENT

The decision below recognized that

> judges defending the Constitution must sometimes share their foxhole with scoundrels of every sort, but to abandon the post because of the poor

> company is to sell freedom cheaply. It is a fair summary of history to say that the safeguards of liberty have often been forged in controversies involving not very nice people.

580 F.3d at 226 (internal quotation and editing marks and citation omitted). The main danger with this case is that ugly facts may invite bad law. And in fact, both the decision below, and the petition for certiorari and opening brief challenging that decision, reflect faulty constitutional analysis.

I. THE FOURTH CIRCUIT ERRED BY IMPOSING A FALSITY REQUIREMENT WHERE FALSITY IS NOT AN ELEMENT OF THE RELEVANT TORT OR THE CLAIM PRESENTED.

The decision below contained a significant point of doctrinal confusion. The court of appeals kept returning to the need to prove falsity and the concomitant need to distinguish between false accusations and overheated rhetoric. 580 F.3d at 218-26. But in this case the defamation claim was eliminated on summary judgment, and Snyder did not appeal that ruling. *Id.* at 213 & n.3. Falsity is not an element of any claim remaining on appeal. Consequently, the Fourth Circuit's analysis was largely off point. Falsity is not an element of the torts of intentional infliction of emotional distress (IIED) or intrusion upon seclusion. Nor should it be. One can sometimes inflict more emotional distress with the truth than with falsity -- for example, by rejoicing obnoxiously and intrusively over the death or grievous mistreatment of someone's loved one. The tort of intrusion upon privacy likewise has nothing to do with truth or falsity.

This is not a novel concept under the First Amendment. A threat, for example, need not be false to fall into the category of unprotected speech. (If anything, a *sincere* threat is worse.) Nor need the contents of a taunt that rises to the level of "fighting words" be false to be unprotected. (Again, the *truth* may actually hurt more -- and be more likely to prompt a fight.) Likewise, neither an intentional infliction of distress nor an intrusion upon seclusion necessarily must entail an element of provable falsity to be constitutionally unprotected.

The Fourth Circuit presumably went astray because it misread this Court's decision in *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988). In *Falwell*, this Court did indeed require a showing of falsity, under the "actual malice" standard, for an IIED claim to pass constitutional muster. *Id.* at 56. But in *Falwell*, the tortious injury asserted flowed precisely from the falsity of the speech in question. Rev. Falwell's claim was not that Hustler had revealed some damaging secret, but rather that it had *told an extremely distressing lie* about Falwell. Naturally, then, falsity was a central factor, even if not, strictly speaking, an element of the tort. Accordingly, it made sense for the Court to require a provably false statement for "publications such as this," *id.*, *viz.*, "the publication of a caricature," *id.* at 57.

The facts of *Falwell*, however, do not exhaust the universe of intentional infliction claims. If anything, the exploitation of *truth* to inflict emotional harm -- rejoicing maliciously in the death or suffering of another, for example -- can hurt far worse than some vile but ultimately untrue accusation. In such cases it makes no sense to require a provably false statement of facts. To do so would in effect constitutionally abolish the tort of intentional infliction of emotional distress by means of speech (or at least render it wholly redundant of the tort of defamation).

The Fourth Circuit therefore asked the wrong question when it asked if there were provably false statements of fact. That portion of the decision below must be vacated.

II. THE FOURTH CIRCUIT CORRECTLY REQUIRED, AT A MINIMUM, A RETRIAL.

Importantly, the court below was plainly correct in overturning the district court's judgment on the basis of faulty jury instructions. With its directions to the jury, *supra* p. 4, the district court authorized *the jury* to determine the meaning of the First Amendment and to draw the line between protected and unprotected speech. The scope of the First Amendment, however, is a question of law (or mixed law and fact), not pure fact. *Hurley v. Irish-American GLIB*, 515 U.S. 557, 567-68 (1995). The jury should not have been left to its own devices. Accordingly, the liability and damage verdicts must at a minimum be vacated, and the matter sent back for retrial with proper limiting instructions.[3]

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[3] The district court also should have instructed the jury as to which particular communications it could consider as possibly tortious. The court should have excluded from consideration particular statements of the protesters that constitute protected speech as a matter of law. Otherwise, there would be an unacceptable risk that the jury might predicate liability and

The remaining question, then, as the Fourth Circuit correctly observed, is whether even a retrial is precluded as a matter of law. The answer here may be "no," but not for the reasons petitioner offers.

III. THE CONSTITUTIONAL ANALYSIS WHICH PETITIONER PROPOSES IS DEEPLY FLAWED.

While the Fourth Circuit went astray in its constitutional analysis, petitioner Snyder commits his own set of constitutional errors. On each of the questions Snyder proposes, he gets it wrong.

A. Question 1: *Falwell*

Snyder's *petition for certiorari* entirely misses the point about *Falwell*. He does not take issue with the defamation line of cases applying as such, but rather argues that *Falwell* supplies the wrong standard of proof in private-on-private lawsuits. Pet. at 5-9. The fundamental flaw with Snyder's position is that the Fourth Circuit did not rely upon the *standard of proof* but rather on the *absence of provably factually false assertions*. So Snyder's Question 1, while academically interesting, is not apposite to this case. Moreover, since falsity is not an element of Snyder's remaining tort claims, the *Falwell* question is doubly irrelevant. *Supra* § I. This court should therefore dismiss the writ, as improvidently granted, as to Question 1.

Snyder's *merits brief*, by contrast, does show an

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damages upon a particularly offensive, but constitutionally protected, message.

understanding of the Fourth Circuit's misstep in transplanting a falsity requirement from *Falwell* to this case. Pet'r Br. at 41-45. To the extent this Court permits Snyder to amend or enlarge Question 1 to encompass this issue, then, the judgment below should be vacated for the reasons set forth above, *supra* § I.

B. Question 2: Rights trumping rights

Snyder's Question 2 reflects a basic misunderstanding of the concept of state action.

A civil damages award against the Phelpses represents state action arguably infringing the First Amendment. But the Phelpses' protest itself represents private action that by definition cannot infringe any constitutional right to freedom of religion or assembly. The Phelpses, as private actors, simply cannot violate any of Snyder's constitutional rights under the First Amendment. Thus, while consideration of Snyder's competing *interests* in emotional tranquility and privacy might shape the limits of the Phelpses' constitutional free speech rights, it is doctrinally incorrect to say (*e.g.*, Pet'r Br. at 55-56) that the Phelpses' actions infringed upon Snyder's constitutional rights. *See Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 278 (1993) (noting requirement of state action for virtually all constitutional violations). For this reason, Snyder cannot (and did not) sue the Phelpses under the Free Exercise Clause or the Freedom of Assembly Clause, and likewise the Phelpses cannot sue Snyder (also a private actor) under the Free Speech Clause. The only relevant constitutional question is what limits apply to state action like the imposition of civil liability.

(Amicus addresses this question below. *Infra* § IV.)

Snyder's Question 2 also poses a severe threat to free speech. He invites the courts to take on the authority to "balance" free speech against the audience's desires. If speech can be balanced away to prevent offense to one's observance of religious rituals, then the anti-Mormon protesters (whether Christian or homosexual) can have their rights "balanced" away. Moreover, pro-lifers can have their rights "balanced" away to prevent offense to one's pursuit of "reproductive rights," citizens on either side of the same-sex marriage debate can have their liberty "balanced" away to avoid giving offense to their opponents, and members of controversial student clubs can have their equal access rights "balanced" away to avoid offending the sensitivities of objecting adults or fellow students.

C. Question 3: Captive audience

Snyder's Question 3 is perhaps the most disturbing, as he seeks to expand the concept of a "captive audience" to justify crushing civil liability upon protesters who were essentially out of sight, on public rights of way, and demonstrating in compliance with police directives. The threat such a rule poses to "unwanted" demonstrators is obvious. Applying "captive audience" ideas in this case is especially unwarranted, where the "exposure" in question came via voluntary TV watching and Internet searching. The Court should reject Snyder's argument out of hand.

In particular, this Court should place no reliance whatsoever upon the misguided and unfortunate decision in *Hill v. Colorado*, 530 U.S. 703 (2000), a decision that was wrong when decided and will remain destructive of the First Amendment until it is overruled. *See* Amicus Brief of the American Center for Law and Justice, *McCullen v. Coakley*, No. 09-592 (U.S. Jan. 4, 2010) (cert. stage); Amicus Brief of Constitutional Law Professors, *id.* To extend the "captive audience" doctrine to restrict or penalize demonstrations in a public forum outside an enclosed building used for an assembly -- religious or otherwise -- would be to hold the First Amendment hostage to audience sensibilities.

IV. RESPECT FOR A ROBUST FIRST AMENDMENT RIGHT TO FREE SPEECH REQUIRES FIRM LIMITS ON SPEECH-BASED TORTS.

There are two state law torts at issue here: intentional infliction of emotional distress (IIED) and intrusion upon seclusion. (The civil conspiracy tort has no independent force, but rather piggybacks on these two.) The intrusion tort cannot be supported in this case consistent with the First Amendment. The IIED tort may be viable here but must at a minimum be retried subject to proper limiting instructions.

A. The Intrusion Tort Is Unconstitutional As Applied to Otherwise Lawful Speech In a Traditional Public Forum.

Free speech receives maximum protection when exercised peacefully in a traditional public forum. *United States v. Grace*, 461 U.S. 171, 177 (1983); *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460

U.S. 37, 45 (1983). The idea that such speech could be subjected to potentially limitless tort liability because it disturbs the atmosphere in an adjoining location is wholly incompatible with constitutional protection for that speech. Indeed, the very point of public demonstrations is often to unsettle the mood in adjacent sites. Labor pickets rattle the operations of the business inside. *Thornhill v. Alabama,* 310 U.S. 88 (1940). Embassy protests disturb the peace of mind of embassy staff and officials. *Boos v. Barry,* 485 U.S. 312 (1988). Civil rights rallies upset the occupants of the neighboring government offices, *Edwards v. South Carolina,* 372 U.S. 229 (1963), businesses, *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982), and homes, *Gregory v. City of Chicago*, 394 U.S. 111 (1969), targeted by the demonstrators. Such protests may well "rain *on* the parades" of others, but they do not elbow their way disruptively *into* such events. The "intrusion," in other words, comes exclusively from the confrontational *message*. This is entirely different from, say, invading a church service, crashing a party, disrupting a family cook-out, etc.

Here, Snyder bases his "intrusion on seclusion tort" exclusively upon an orderly demonstration held on a public street.[4] While this particular demonstration embodied an extreme lack of charity, it did not physically invade (or even disrupt with loud noises or intrusive lights) the funeral service itself. That service, after all, was held inside a building. The impact of the protest upon that event was no more -- and, under the circumstances, probably less -- than the impact upon countless other events subjected to protests. Hence, the First Amendment precludes an "intrusion upon seclusion" claim here.

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[4] Snyder implicitly abandons any reliance upon the Phelpses' website posting -- the "epic" -- as an intrusion. *See* Pet. Br. at 20, 46-55 (relying exclusively upon the "funeral picketing" as the basis for the tort). He does so wisely: to regard a web page on the Internet as an "intrusion upon seclusion" would be not just ludicrous but unimaginably chilling to Internet free speech. (This is not, by contrast, a case of unsolicited emails or pop-ups being forced upon a person or group.)

It bears mention that, at the same time the Phelpses were demonstrating, the Patriot Guard Riders and local school children were engaged in demonstrations supportive of Snyder. The key difference was the viewpoint and tastefulness of the respective groups. Thus, had police arrested or obstructed one and not the other, it would have been a blatantly viewpoint based restriction on speech. Selectively to treat one group's message as an "intrusion upon seclusion," then, would be to import this same viewpoint bias through a side door.

B. An Intentional Infliction Claim Based Upon Speech Cannot Proceed Absent a Showing of Intentional *Maliciousness*, Not Just Intentional *Disturbance*.

Free speech is often designed precisely to distress the audience. As this Court has long recognized,

> a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or *even stirs people to anger*. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and

> have *profound unsettling effects* as it presses for acceptance of an idea.

Terminiello v. City of Chicago, 337 U.S. 1, 4 (1949) (emphasis added). Indeed, the battle for our national independence and the struggle for civil rights likely would have suffered greatly had not citizens been able to provoke, in their fellow Americans, profound discontent with the status quo. In short, there is a crucial place under the First Amendment for speech that "inflicts emotional distress."

The Phelpses' hateful message is "at best a distant cousin" of the free speech described above, "and a rather poor relation at that." *Falwell,* 485 U.S. at 55. But unless all aggressive advocacy is to be left exposed as a target for tort suits, a "principled standard," *id.*, is necessary to distinguish protected (albeit unpleasant) provocation from unprotected torts.

It is thus constitutionally insufficient to assert that speech is designed to distress the listener. A physician may need to distress a patient to get that patient to begin a serious weight loss program, or to quit smoking, or to take the prescribed medications. A civil rights activist might need to distress a black pastor to get him and his church involved in a local issue. A concerned parent might need to distress other parents to get them to stand up against some threat to their collective children. In each such case, the speaker could be alleged to have intentionally inflicted emotional distress; yet all such speech is plainly protected under the First Amendment.

Nor is it constitutionally sufficient that the audience is a "private figure" as opposed to a "public figure." As the preceding illustrations show, the "private" status of the audience does not negate the value of the free speech.

Nor is it an adequate protection to require the tortious conduct to be "outrageous."

> "Outrageousness" in the area of political and social discourse has an inherent subjectiveness about it which would allow a jury to impose liability on the basis of the jurors' tastes or views, or perhaps on the basis of their dislike of a particular expression. An "outrageousness " standard thus runs afoul of our longstanding refusal to allow damages to be awarded because the speech in question may have an adverse emotional impact on the audience.

Falwell, 485 U.S. at 55.

At a minimum, then, for the IIED tort to be consistent with First Amendment protection for free speech, it must -- in addition to satisfying the required state law elements -- be reserved for instances of gratuitous maliciousness.

The requirement of *gratuitousness* plays an important role. Short of illegal harassment, the First Amendment protects speech, even vitriolic speech, designed to shame or browbeat people into legitimate action. *NAACP v. Claiborne Hardware*, 458 U.S. at 910-11, 926. (By contrast, speech designed to induce *unlawful* action, such as intentionally or recklessly harrying a teenager into committing suicide, would fall outside the scope of the First Amendment.)

The requirement of *maliciousness* plays an important, related role. Where the speech in question is delivered, not for the purpose of inducing legitimate action, but rather for the pure satisfaction of inflicting pain, the claim of First Amendment protection approaches its nadir. "Congratulations on the rape of your daughter," "Hooray for your diagnosis of AIDS," "I'm so glad your son died in the 9/11 attacks" -- such expressions of *Schadenfreude*, when intentionally, personally directed to afflicted victims or their immediate family members, would seem to have little or no claim to constitutional protection.[5]

It may well be that under a properly limited theory of liability, the Phelpses could be held liable for their celebratory picketing of a funeral. The district court, however, gave no such limiting instruction, leaving it instead to the jury to draw its own constitutional lines. The verdict therefore cannot stand in its present form.

The decision below should be vacated and the case remanded for retrial with proper instructions confining the jury to the determination of facts, not law, and limiting any potential liability to matters not protected by the First Amendment.

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[5] Amicus does not address the question whether even this requirement would be inadequate where the plaintiff is a "public figure." *Cf. Falwell*, 485 U.S. at 56.

CONCLUSION

This Court should vacate the decision of the Fourth Circuit and remand for further proceedings.

Respectfully submitted,

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June 1, 2010

AMICUS
CURIAE
BRIEF

No. 09-751

IN THE

Supreme Court of the United States

ALBERT SNYDER,

Petitioner,

v.

FRED W. PHELPS SR., *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AND THE AMERICAN CIVIL LIBERTIES UNION OF MARYLAND AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*[1]

The American Civil Liberties Union ("ACLU") is a nationwide, nonprofit, nonpartisan organization dedicated to the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. The ACLU of Maryland is one of its state affiliates. Historically, the ACLU and its affiliates have addressed the relationship between freedom of speech and such torts as the intentional infliction of emotional distress, including participating as *amici curiae* in the instant case before the Fourth Circuit Court of Appeals, and in *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988). The First Amendment issues raised on this appeal are a matter of substantial concern to the ACLU and its members.

STATEMENT OF THE CASE

1. This case arises out of statements by members of Westboro Baptist Church ("WBC") before and after the March 10, 2006, memorial service for Petitioner Albert Snyder's son Matthew, an American Marine killed in Iraq.

WBC is a fundamentalist Baptist church whose members practice a "fire and brimstone" religious faith. They believe that the Bible contains literal truth and that God hates gay men and women and is punishing America for its tolerance of homosexuality (particularly in the military), and for other sins, including abortion and divorce. WBC members also believe it is their religious duty to spread their message broadly and publicly that America is incurring God's wrath—and God is killing American soldiers—for the country's sins. They believe that "God is cursing America," and that "you can either pay attention [to the WBC's] message, repent and get healed, or you can rebel against it and be destroyed." (IX App. 2344.)[2]

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[1] Letters consenting to the filing of this brief have been submitted to the Clerk. Counsel for *amici* states that no counsel for a party authored this brief in whole or in part, nor made a monetary contribution intended to fund the preparation or submission of this brief. Only *amici curiae*, their members, and their counsel contributed to its preparation or submission.

WBC has conducted pickets over the past 20 years to publicize their message through media attention. More recently, they have begun demonstrating outside funeral memorial services, including soldiers' memorial services. WBC has picketed more than 150 memorial services in all 50 states in order, they believe, to be "timely and topical."

WBC picketed at three different locations on March 10, 2006. WBC members (collectively with WBC, "Respondents") traveled with four of their children from Kansas to Baltimore, Maryland, taking with them picket signs they had previously used at other protests. (VIII App. 2222.) They went first to the Naval Academy in Annapolis, Maryland, to protest gays in the military. (IX App. 2369.) They displayed the same picket signs before the Maryland State House to protest that legislature's consideration of a proposed statute prohibiting picketing activity within a certain distance from funeral services. (*Id.* at 2369-70.) Each picket lasted about 30 minutes.

Respondents next conducted the picket from which this case arises, outside St. John's Catholic Church in Westminster, Maryland, where Matthew Snyder's memorial service was held. They met on arrival with local police to learn where they should stand for their picket, having earlier notified the police of their intent to picket outside the service. The police directed them to a 20- by 25-foot area behind a plastic fence, located on public land that was 1000 feet from the church. (VIII App. 2282-85.) Respondents stood where the police directed them, and displayed the same signs they had displayed at their two earlier pickets: "America is Doomed," "God Hates the USA/Thank God for 9/11," "Pope in Hell," "Fag Troops," "You're Going to Hell," "God Hates You/God Hates America," "Semper Fi Fags," "Thank God for Dead Soldiers," "Don't Pray for the USA," "God's View/Not Blessed, Just Cursed," "Thank God for IEDs," "Priests Rape Boys," and "God Hates Fags."[3]

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[2] References are to the Appendix submitted in the Court of Appeals.

Respondents displayed their signs for about 30 minutes, sang hymns, and recited Bible verses. (*Id.* at 2286; IX App. 2371.) Although Petitioner claims that Respondents "disrupt[ed]" the memorial service (Pet'r Br. 53), the facts show otherwise. Mr. Snyder testified that the service was "very nice." (VII App. 2080.) Others testified that the ceremony was "beautiful and very moving," and "could not have been any more beautiful." (X App. 2651.) Respondents remained inside the fenced-in area the entire time, and did not yell or use profanity. (VIII App. 2286, 2293.) They neither went to the cemetery nor entered the church. (VIII App. 2168; IX App. 2371.)

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[3] "God Hates the USA/Thank God for 9/11," "God Hates You/God Hates America," and "God's View/Not Blessed, Just Cursed," were two-sided signs that Respondents flipped back and forth during the picket to make visible the writing on each side. (IX App. 2526-28.)

Others, too, displayed messages outside the church. More than 20 Patriot Guard Riders (who surround WBC picketers at funerals and block their signs) carried American flags and stood between Respondents and the church. (VII App. 2080; VIII App. 2171.) The Patriot Guard made a "tunnel" of flags from Mr. Snyder's car to the church entrance for him to walk through as he entered the church. Students from a nearby school also attended, standing in the church parking lot displaying small American flags and signs, including signs reading: "St. John's School is Praying for You" and "We Are Proud of Your Son." (XV App. 3759-60.)

Mr. Snyder did *not* see the writing on Respondents' signs either as he arrived or as he departed the service. He testified that he could see only the "tops" of the signs in the distance as his car was pulling into the church, and every other witness on the subject said that they could neither see nor hear the protestors. (VII App. 2260; VIII App. 2142, 2164.) It was only at home later that day watching television coverage of the picket that Mr. Snyder saw what was written on Respondents' signs. (VII App. 2086.)

A few weeks after the funeral, there was posted on WBC's website the "Burden of Marine Lance Cpl. Matthew Snyder," which WBC refers to as an "epic." WBC members write "epics" after all of their pickets. (IX App. 2522.) Among other things, this "epic" expressed the view that Mr. Snyder taught Matthew to "defy his Creator," "raised him for the devil," and "taught him that God was a liar." (Pet. App. 37a.) Approximately four to five weeks after the funeral, Mr. Snyder stumbled upon the "epic" while searching his son's name on the Internet. (VIII App. 2129-30.)

2. On June 6, 2006, Mr. Snyder filed a five-count suit in the United States District Court for the District of Maryland. Two counts arose solely from the "epic" (defamation and "publicity" given to private life) and three arose from both the picketing and the "epic" (intrusion upon seclusion, intentional infliction of emotional distress, and conspiracy).

At the final pretrial conference on October 15, 2007, after substantial discovery, the district court dismissed on summary judgment the "publicity" and defamation claims, the former because the "epic" did not publicize any "private" information about Mr. Snyder, and the latter because the "epic" (a) was not defamatory, (b) reflected only Respondents' religious opinion, and (c) did not tend to expose Mr. Snyder to public hatred or scorn. (Pet. App. 66a.) Mr. Snyder did not cross-appeal these rulings.

However, the district court rejected Respondents' argument that the First Amendment barred the intrusion-upon-seclusion, intentional-infliction-of-emotional-distress, and conspiracy claims. It concluded that all but three of the picket signs commented on matters of public concern and therefore were not actionable under the First Amendment. (V App. 1299.) Nevertheless, it denied summary judgment because it concluded that the jury could find three signs ("You're Going to Hell," "God Hates You," and "God Hates Fags") addressed only private matters, and if so, could lawfully lead to liability in tort. And although the district court ruled that all but three of Respondents' signs presented constitutionally protected speech immune from tort liability, it permitted Mr. Snyder to present *all* of the signs to the jury.

Later, at the jury charge conference, the district court: (a) rejected Respondents' requested instructions that would limit the jury to deciding liability based only upon the three signs that it had held could possibly be unprotected by the First Amendment (XV App. 3822-26, 3833 (defendants' proposed jury instructions); XI App. 2875-76 (rejecting such instructions)); (b) stated that it would instruct the jury on principles of First Amendment law, and have the jury apply those legal principles to Respondents' speech (XI App. 2877-78); and (c) declined to instruct the jury that the signs which it had held were entitled to First Amendment protection could *not* form the basis for a plaintiff's verdict (XV App. 3822-26, 3833; XI App. 2875-79). Finally, it decided to charge the jury in a fashion that invited a verdict for Mr. Snyder on intentional infliction of emotional distress if the jury found that Respondents' speech was "outrageous" (a term it did not define), and on the "intrusion" claim if the jury found that Respondents' speech was "highly offensive to a reasonable person." (XI App. 3004-05.)

The foregoing caused Petitioner to emphasize in closing argument that the content of Respondents' placards was "vulgar, outrageous and shocking"—language that tracked the expected jury instructions—and to request a verdict for plaintiff because of the messages the placards conveyed. The jury indeed returned a plaintiff's verdict, awarding $2.9 million in compensatory damages and $8 million in punitive damages (later reduced by the court to $2.1 million). The district court denied post-trial motions. (Pet. App. 125a-126a.) Respondents appealed.

3. The Court of Appeals reversed. It observed that "tort liability under state law, even in the context of litigation between private parties, is circumscribed by the First Amendment" and that "there are constitutional limits on the *type* of speech to which state tort liability may attach." (Pet. App. 20a, 22a.) Most significantly, after reviewing this Court's decision in *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990), its predecessor decisions, and its progeny, the Court of Appeals concluded that "[t]here are two subcategories of speech that cannot reasonably be interpreted as stating actual facts about an individual, and that thus constitute speech that is constitutionally protected." (Pet. App. 24a.) One was "statements on matters of public concern that fail to contain a 'provably false factual connotation.'" (*Id.* (quoting *Milkovich*, 497 U.S. at 20).) The other was "rhetorical statements employing 'loose, figurative, or hyperbolic language.'" (*Id.* at 26a (quoting *Milkovich*, 497 U.S. at 20-21).)

The Court of Appeals then addressed the "First Amendment Instruction." It concluded that the district court erred by having the jury decide whether Respondents' speech was entitled to First Amendment protection, and then to balance Respondents' First Amendment rights with Petitioner's interest to be free from speech that caused him emotional distress. (*Id.* at 29a.) It noted in particular that the Instruction permitted the jury to impose liability based on signs that the district court had acknowledged *were* entitled to full First Amendment protection because they stated only Respondents' opinions on matters of public concern. (*Id.* at 29a n.16.) The Court of Appeals therefore held that the judgment had to be vacated because the trial court improperly abdicated to the jury the duty of applying the law. (*Id*. at 29a.)[4]

However, because the extent of First Amendment protection is a question of law, and because each of the placards was in the record, the Court of Appeals proceeded to measure the placards under the First Amendment itself. The Court found that 10 placards—"distasteful as these signs are"—"involve matters of public concern, including the issue of homosexuals in the military, the sex-abuse scandal within the Catholic Church, and the political and moral conduct of the United States and its citizens" (*id.* at 32a), and consequently could not constitutionally give rise to tort liability. (*Id.* at 34a.) The Court found that another group of placards (ones condemning the United States, and referring to "fags," troops, and dead soldiers), by their literal terms referred to groups of people generally, and could not reasonably be interpreted to refer specifically to Petitioner's son. (*Id.* at 33a.) Moreover, these rhetorical and hyperbolic statements were, the Court held, (a) not subject to objective verification, (b) not assertions of "actual facts *about* [Petitioner] or his son," and (c) "designed to spark controversy and debate" about the issues in which Respondents were interested. (*Id.* at 34a.) Only two signs "present[ed] a closer question"—"You're Going to Hell" and "God Hates You" (the latter of which appeared on the back side of the "God Hates America" sign, *see supra* note 3). (*Id.* at 35a.)

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[4] "The inquiry into the protected status of speech is one of law, not fact." *Connick v. Myers*, 461 U.S. 146, 148 n.7 (1983); *see also Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 761-63 (1985) (deciding public concern issue where lower courts had not ruled on the issue).

Although those signs, the Court ruled, possibly could be interpreted as being directed at Petitioner individually, they were still constitutionally protected because they could not reasonably be "interpreted as stating actual facts about any individual." (*Id.*)

The Court of Appeals similarly reviewed the "epic." It concurred with the district court's conclusion that its contents "were 'essentially [Respondents'] religious opinion'" (*id.* at 40a n.20), and that its contents "primarily focused on the more general message to which their protests were directed" (*id.* at 39a)—*viz.*, American tolerance of homosexuality, the activities of the Catholic Church, and the military.

In sum, the Court of Appeals held that each aspect of Respondents' speech on which the jury predicated liability was protected by the First Amendment. It therefore reversed.

SUMMARY OF ARGUMENT

It is important at the outset to stress what this case is and is not about. First and foremost, this case is about *speech,* not conduct. The theory of Petitioner's case was that his injury flowed directly from the content of Respondents' speech. Had Respondents attended the Snyder memorial service without their signs, or instead displayed signs expressing sympathy (such as those held by the St. John's school children), there would have been no verdict against Respondents. The jury found against Respondents because of what they *said*, not because of their *presence* at Matthew Snyder's funeral.

Second, this case is not about the constitutionality of statutes regulating the time, place, and manner of funeral protests, and the arguments of various *amici* predicting that affirmance here will invalidate such laws are incorrect. No "funeral statute" is involved in this case. Respondents displayed their signs at a location chosen for them by local law enforcement, not one they chose themselves. And that location—1000 feet from the church entrance—was 10 times farther removed from the church than Maryland's later-enacted funeral statute would permit.

Because this is a pure speech case, the Court of Appeals ruled correctly. The common law torts of "intentional infliction of emotional distress" and "intrusion upon seclusion" are intended to protect individuals from unwanted and injurious conduct that is directed towards them. Where, as here, the plaintiff alleges that the *substance* of speech caused emotional injury, these torts are designed to protect the *listener* from hearing speech that he prefers not to encounter, and to impose liability on the speaker for having spoken. That is why the district court instructed the jury to return a verdict for Petitioner on the "intrusion" claim if the jurors found Respondents' speech to be "highly offensive to a reasonable person." It is also why it instructed the jurors to return a verdict for Petitioner on the "emotional distress" claim if they found that Respondents' speech was "extreme and outrageous."

However, the First Amendment guarantees of freedom of speech and the free exercise of religion are designed to protect the right of *speakers* to voice their views on matters of public concern and to express their religious convictions. So, while tort law penalizes "highly offensive" speech, "[i]t is firmly settled that . . . the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers." *Street v. New York*, 394 U.S. 576, 592 (1969). Likewise, while tort law may penalize "extreme and outrageous" speech, this Court has noted that:

> "Outrageousness" in the area of political and social discourse has an inherent subjectiveness about it which would allow a jury to impose liability on the basis of the jurors' tastes or views, or perhaps on the basis of their dislike of a particular expression. An "outrageousness" standard thus runs afoul of our longstanding refusal to allow damages to be awarded because the speech in question may have an adverse emotional impact on the audience.

Hustler Magazine v. Falwell, 485 U.S. 46, 55 (1988). In short, "[i]f there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas v. Johnson*, 491 U.S. 397, 414 (1989). This is so even if the idea is so offensive that it causes personal pain (*amici* certainly do not question the sincerity of Petitioner's response to the statements at issue here).

1. The Court of Appeals properly held that the speech on which the jury rested its verdict expressed Respondents' religious and political views on matters of public concern and, furthermore, that Respondents' speech could not reasonably be interpreted "as stating actual facts about any individual" because its rhetorical hyperbole was not subject to objective verification. As the Court of Appeals found, most of Respondents' picket signs addressed matters of obvious public concern, including America's tolerance of homosexuality, the role of gays in the military, and the abuse of young parishioners by Catholic priests. The two remaining signs the Court of Appeals thought to be ambiguous—"God Hates You" and

"You're Going to Hell"—likewise are entitled to constitutional protection when their content, form, and context are assessed (as they must be) against the entire record.

2. The Court of Appeals did not err because the *listener* in this case was a "private" individual rather than a "public figure." The First Amendment protects the right of *speakers* to express their personal views on public issues, and this Court has long understood the First Amendment to protect the right to speak without regard to the identity of the target audience. Consequently, affirmance in this case does not require this Court to "extend [the] *Hustler*" decision to protect "private" citizens from offensive speech (Cert. Pet. 6), but merely to apply existing First Amendment doctrine allowing expression of opinions on matters of public concern without fear of potentially ruinous tort liability of the sort the jury imposed here.

3. This case does not involve a "captive audience." That issue was neither raised in, nor decided by, the courts below. In any event, there was simply no captive audience for Respondents' speech. Respondents stood so far away from the church that Petitioner could not see what was written on their picket signs. Moreover, unlike a rule designed to protect "captive audiences," the jury's post-hoc verdict based on the "outrageousness" and "offensiveness" of Respondents' speech was neither content neutral, nor a reasonable time, place, and manner limitation on speech.

ARGUMENT

I. RESPONDENTS' SPEECH WAS PROTECTED UNDER THE FIRST AMENDMENT

A. The First Amendment Protects The Right Of Speakers To Express Even Offensive Opinions On Matters Of Public Concern.

The First Amendment reflects our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). A citizen's right to speak on matters of public concern "'is more than self-expression; it is the essence of self-government.'" *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 759 (1985) (citation omitted). "[S]peech on public issues occupies the highest rung of the hierarchy of First Amendment values." *Id.* (citation and internal quotation marks omitted). This is so even if the speech may be offensive to listeners. "'Indeed, if it is the speaker's opinion that gives offense, that consequence is a *reason* for according it constitutional protection.'" *Hustler*, 485 U.S. at 55-56 (emphasis added) (citation omitted).

Moreover, while the State has an interest in protecting its citizens' emotional well-being through tort law, "the presence of activity protected by the First Amendment imposes restraints on the grounds that may give rise to damages liability and on the persons who may be held accountable for those damages." *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 916-17 (1982).

Thus, the threshold question is whether Respondents' speech expressed their views, however controversial, on matters of public concern. If so, it was entitled to "special protection" under the First

Amendment, *Dun & Bradstreet*, 472 U.S. at 759, subject to punishment in tort by the State only in very narrow circumstances not present here.[5]

B. Respondents "Spoke" On Matters Of Public Concern.

Whether speech addresses matters of public concern depends upon the "'content, form, and context'" of the speech, "'as revealed by the whole record.'" *Dun & Bradstreet*, 472 U.S. at 761 (citation omitted). Here, the record reveals that Respondents' speech was addressed to matters of public concern.

1. The Picket

There can be little dispute that the majority of the signs displayed at the picket addressed matters of public concern: "America is Doomed," "God Hates the USA/Thank God for 9/11," "Pope in Hell," "Fag Troops," "Semper Fi Fags," "Don't Pray for the USA," "God's View" [with a picture of "Uncle Sam" targeted in a gun scope]/Not Blessed, Just Cursed," "Thank God for IEDs," "Thank God for Dead Soldiers," "Priests Rape Boys," and "God Hates Fags." Respondents testified that the signs expressed their sincerely held religious views that God is killing American troops as punishment for the nation's sins, including homosexuality, abortion, and divorce (VIII App. 2223, 2227, 2232; IX App. 2422-23, 2426); that God is perfect and must be thanked for everything, including the death of soldiers (IX App. 2414, 2421);

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[5] Speech on matters of public concern may not be protected if it constitutes speech which the Court has "accorded no protection," such as obscenity or "fighting words." *Dun & Bradstreet*, 472 U.S. at 758 n.5; *see also Hustler*, 485 U.S. at 56. But Petitioner does not contend that Respondents' speech falls within that category.

and that God hates and will punish all sinners who, in Respondents' view, are the vast majority of Americans (IX App. 2372-73).

The Fourth Circuit concluded: "[A]s utterly distasteful as these signs are, they involve matters of public concern, including the issue of homosexuals in the military, the sex-abuse scandal within the Catholic Church, and the political and moral conduct of the United States and its citizens." (Pet. App. 32a.) This conclusion is clearly correct, and Petitioner does not appear to seriously contend otherwise. *See, e.g.*, *United States v. Nat'l Treasury Emps. Union*, 513 U.S. 454, 461, 466 (1995) (holding that plaintiff's lectures on religion were matters of public concern).

Indeed, when prominent religious figures made similar statements—as when Revs. Jerry Falwell and Pat Robertson stated that 9/11 was God's punishment for America's tolerance of homosexuality and abortion—these statements generated widespread media coverage and discussion. *See, e.g.*, Daniel Weintraub, *Falwell Says America Got What It Deserved*, Sacramento Bee, Sept. 18, 2001, at B7; *cf. City of San Diego v. Roe*, 543 U.S. 77, 83-84 (2004) ("public concern is something that is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public at the time of publication"). Respondents' speech may have been inappropriate and controversial to many, but "[t]he inappropriate or controversial character of a statement is irrelevant to the question whether it deals with a matter of public concern." *Rankin v. McPherson*, 483 U.S. 378, 387 (1987).

The Fourth Circuit believed that the remaining signs displayed at the picket ("You're Going to Hell" and "God Hates You") presented a "closer question." Viewed in context, however, it is clear that these signs, too, comment on matters of public concern, and not "purely private" matters which are of "less First Amendment concern." *Dun & Bradstreet*, 472 U.S. at 759. On the reverse side of the "God Hates You" sign was written "God Hates America," showing that the sign's reference to "You" is to the nation as a whole, not Petitioner or any one specific individual in the context of a private dispute. Moreover, the signs cannot be divorced from the context of the larger picket; when this context is considered, the references to "You" imply the damnation of all sinners, for the reasons expressed on the other signs at the picket. And these same signs were used by Respondents at numerous pickets all over the country, including two that same day at the Maryland State House and the Naval Academy. This demonstrates that "You're Going to Hell" and "God Hates You" were not intended as invective towards Mr. Snyder personally, as the district court appeared to believe, but were statements to all passersby of Respondents' religious view that Americans are sinners and are suffering, and will continue to suffer, God's wrath unless they change.[6]

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[6] Petitioner asserts that Respondents' "signs were *not* about the purported matters of public concern cited by the Fourth Circuit" because "the Phelpses began protesting military funerals shortly after members of the WBC allegedly were accosted by Marines." (Pet'r Br. 36.) Not so. Respondents testified that the "assault" *convinced* them that there were gays in the military and they should begin protesting on that issue. (VII App. 2226-27.) But even if Petitioner is correct that Respondents were motivated to picket out of revenge or hatred, this would not make their speech any less of public concern. "[E]ven when a speaker or writer is motivated by hatred or

2. The "Epic"

The "epic" Respondents posted on their website a few weeks after their demonstration essentially recapped the events of the picket, and consisted of Bible passages interspersed with statements discussing the picket and other issues. The district court dismissed Petitioner's defamation claim based on the "epic" on the ground that it was essentially Respondents' "religious opinion." (Pet. App. 66a.) Petitioner never cross-appealed this ruling, and his brief in this Court does not challenge any particular statement in the "epic" as being unrelated to public concern.

The "epic" constitutes a statement of Respondents' views on matters of public concern because it states their beliefs about the root causes of America's domestic and foreign problems. Respondents believe that America is suffering "God's vengeance" because Americans do not live in accordance with "God's word" as communicated in the Bible, by, *inter alia*, tolerating homosexuality and permitting divorce.

So, for example, the "epic" states: "It will be more tolerable for Sodom and Gomorrah in the Day of Judgment than for the people of Maryland."; "[W]e criss-cross this nation daily, reminding you that if you would turn from your wicked ways, God will bless you; and if not, he will continue to curse you . . . .";

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illwill his expression [may be] protected by the First Amendment." *Hustler*, 485 U.S. at 53. "Debate on public issues will not be uninhibited if the speaker must run the risk that it will be proved in court that he spoke out of hatred; even if he did speak out of hatred, utterances honestly believed contribute to the free interchange of ideas and the ascertainment of truth." *Garrison v. Louisiana*, 379 U.S. 64, 73 (1964).

"[T]he Maryland Legislature (THINK: TALIBAN) is setting about to pass a law attempting to shred the First Amendment. Their purpose is simple: it is to blot out the word of God from the landscape. In response, God will blot out their young men."; "Maybe the Maryland legislature can pass a law abolishing hell and preventing God from killing any more of their young men." (XV App. 3793-94.)

These statements are entitled to constitutional protection because they express what Respondents believe to be the *causes* of American domestic and foreign difficulties. Although many people would consider the content of much of the "epic" offensive or controversial, and it is contrary to the ACLU's own views on these issues, it nevertheless addresses issues of public concern when viewed as a whole. *Cf. Rankin*, 483 U.S. at 387 (inappropriate or controversial nature of speech irrelevant to public-concern inquiry). Statements criticizing Catholicism and the Church's sex-abuse scandal, or calling the United States a wicked and sinful nation, or criticizing the Maryland legislature for passing a law "shred[ding] the First Amendment," address social and political matters of public concern, not "purely private" matters. *Dun & Bradstreet*, 472 U.S. at 759.

The fact that a small number of statements mention the Snyders by name does not disqualify the statements from constitutional protection. Those statements cannot be viewed in isolation—whether they address matters of public concern or "purely private" matters must be assessed in the context of the "epic" as a whole. *See Rankin*, 483 U.S. at 386 (statement expressing hope that assassin shoots President dealt with matter of public concern; "in context," it "was made in the course of a conversation addressing the policies of the President's administration"); *cf. Watts v. United States*, 394 U.S. 705, 706, 708 (1969) (statement made during anti-war rally that "[i]f they ever make me carry a rifle the first man I want to get in my sights is L.B.J." was constitutionally protected; "[t]aken in context," it was "'a kind of very crude offensive method of stating a political opposition to the President'").

Viewed in context, the statements that refer to the Snyders do not address mere private matters but are examples illustrating Respondents' broader points. That connection is readily apparent, for example, in the statement that Matthew's death provides Respondents with "an opportunity to preach [God's] words to the U.S. Naval Academy at Annapolis, [and] the Maryland Legislature," which Respondents picketed on the same day as Matthew's funeral. (XV App. 3793.) Likewise, the statement "they sent [Matthew] to fight for the United States of Sodom, a filthy country that is in lock step with his evil, wicked, and sinful manner of life, putting him on the cross hairs of a God that is so mad he has smoke coming from his nostrils . . . ." (*Id.* at 3791.) Consistent with this contextual understanding, as Respondents testified, the reference to the Snyders "hating" Matthew and "rais[ing] him for the devil" (statements the district court expressly held were not defamatory) meant that by allowing him to fight for America ("God's enemy," in Respondents' view) and by not following the literal teaching of the Bible, they, like all Americans, were invoking God's wrath. However unpopular, these are Respondents' sincerely held religious views about social and political issues, and, as such, address matters of public concern.

C. The Tort Rights Of "Private Figures" Are Properly Limited By The First Amendment.

Petitioner and various *amici* assert that the Court of Appeals erred because it failed to give weight to the fact that Petitioner was a "private figure," and by limiting the tort rights of private figures in ways similar to the way the First Amendment limits the rights of "public figure" plaintiffs. Petitioner warns (Pet'r Br. 42) that unless reversed, the Court of Appeals decision will mean that in cases such as this:

> The plaintiff may recover for emotional distress caused by outrageous speech that includes false statements, but he may not recover for the same degree of emotional distress caused by outrageous and intentionally harmful statements that are not capable of being proven true or false.

This argument, however, misapprehends the basic nature of this Court's First Amendment jurisprudence. An unbroken line of cases brought by "private figures" asserting common law tort claims holds that where the speech at issue relates to matters of public concern and is not demonstrably false, the First Amendment protects *the speakers'* rights to free expression.

For example, in *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 776 (1986), the Court held that where speech is on a matter of public concern, a private-figure plaintiff in a defamation case cannot recover absent proof, at a minimum, that the challenged speech contained a false statement of fact. Thus, "a statement of *opinion relating to matters of public concern* which does not contain a provably false factual connotation will receive *full constitutional protection*." *Milkovich*, 497 U.S. at 20 (emphasis added). This rule is necessary to "encourage debate on public issues," *Hepps*, 475 U.S. at 777, and provides the "'breathing space'" that freedom of expression needs to survive. *New York Times*, 376 U.S. at 271-72 (citation omitted). The Court recognized that placing the burden of proving falsity on private figures would mean that some deserving plaintiffs would be unable to recover damages for speech about them that is false, but not provably so. *Hepps*, 475 U.S. at 778. Nevertheless, the First Amendment mandates that private figures go uncompensated to protect speakers' rights to express their opinions on matters of public concern. *Id.*[7]

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[7] The State Attorneys General *amici* suggest that as a matter of tort law the First Amendment protects speech only when the speaker defendant is a member of the media. (Br. of Kansas, *et al.* 18.) Although this Court has never expressly decided whether the principles announced in the *New York Times* line of cases apply to non-media defendants, *see Milkovich*, 497 U.S. at 20 n.6 (reserving the issue), any such distinction is incompatible with the Court's view that the "inherent worth of the speech . . . does not depend upon the identity of its source, whether corporation, association, union, or individual." *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 777 (1978); *see also Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876, 905 (2010) ("'We have consistently rejected the proposition that the institutional press has any constitutional privilege beyond that of other speakers.'" (citation omitted)); *Dun & Bradstreet*, 472 U.S. at 781-82 (Brennan, J., dissenting) (media/nonmedia distinction is "irreconcilable with the fundamental First Amendment principle" that the inherent worth of speech does not depend on identity of its source).

It is therefore unsurprising that every circuit to decide the issue, including the Fourth Circuit in this case, has concluded that the same First Amendment protections apply to media and

This First Amendment rule has not been limited to defamation cases. To the contrary, the Court has stressed that the First Amendment right to express one's opinion freely on matters of public concern without fear of liability does not turn on creative pleading or the particular tort law designation invoked by a plaintiff in litigation.

Thus, in *Time, Inc. v. Hill*, 385 U.S. 374 (1967), the Court held that a private-figure plaintiff could not recover damages (including for emotional distress) under an invasion-of-privacy statute based on the publication of information on matters of public concern, without first proving that the speech at issue was false, and that it was made knowingly or recklessly. *Id.* at 390-91. Again, the Court rested its conclusion on the "breathing space" required by the First Amendment to survive. *Id.* at 388 (citation and internal quotation marks omitted); *cf. Claiborne*, 458 U.S. at 907-15 (First Amendment barred private figures from recovering tort damages for interference with business and conspiracy, where alleged injury arose out of peaceful picketing on matters of public concern).

The Court applied these principles to the tort of intentional infliction of emotional distress in *Hustler*. At issue in *Hustler* was whether Rev. Jerry Falwell could recover emotional distress damages for offensive and "outrageous" speech (an offensive ad parody which implied that Rev. Falwell had sex with his mother). Balancing the interests in protecting citizens from emotional harm by "outrageous" conduct on one hand against the First Amendment's protection of

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non-media defendants alike. (Pet. App. 24a n.13 (collecting cases).)

speech on the other, the Court rejected the view that, "so long as the utterance was intended to inflict emotional distress, was outrageous, and did in fact inflict serious emotional distress, it [was] of no constitutional import whether the statement was a fact or an opinion, or whether it was true or false." 485 U.S. at 52-53. Nor could liability turn on whether the speech was "outrageous" because "[a]n 'outrageousness' standard . . . runs afoul of our longstanding refusal to allow damages to be awarded because the speech in question may have an adverse emotional impact on the audience." *Id.* at 55.

Emphasizing again the "breathing space" the First Amendment requires, the Court held that Rev. Falwell could not recover damages without first proving that the speech at issue contained a "false statement of fact," and that the false statement was made with "'actual malice'" (that is, "with knowledge that the statement was false or with reckless disregard as to whether or not it was true"). *Id.* at 56.

Petitioner and some *amici* contend that *Hustler* has no relevance here because it involved a public-figure plaintiff. Undoubtedly, as the Court noted throughout, Rev. Falwell was a public figure. *See id.* at 57 & n.5. But it is equally clear that the speech criticizing him was a matter of public concern, a fact the Court also emphasized. *See id.* at 53 (describing the speech at issue as "*public debate* about [a] public figure[]" (emphasis added)); *id.* (rejecting argument that state could punish speech if spoken out of hatred as impermissible "in the world of *debate about public affairs*" (emphasis added)); *id.* at 55 (rejecting "outrageousness" standard for speech "*in the area of political and social discourse*" (emphasis added)). Speech of the sort at issue in *Hustler*—a coarse parody of a public figure known for his virtue—was in itself a matter of public concern.

Hustler thus falls neatly within the continuum of cases where the Court has held that, regardless of the identity of the plaintiff, and regardless of the tort alleged, the First Amendment prohibits the State from awarding damages for the emotional impact of speech on matters of public concern without proof, at a minimum, that the speech was *false*. *Cf. Cohen v. Cowles Media Co.*, 501 U.S. 663, 671 (1991) (First Amendment limitations on tort apply where a plaintiff is "seeking damages for injury to his reputation or his state of mind.").

Accepting Petitioner's argument, that a private figure alleging intentional infliction of emotional distress or intrusion upon seclusion based on the impact of speech on public concern need not prove falsity to recover damages, would eviscerate the First Amendment's protections for such speech, and the "breathing space" the Constitution requires. Otherwise, a private-figure plaintiff could easily evade the First Amendment simply by bringing a speech-based claim as a tort other than defamation.

Moreover, the rationale for distinguishing between public and private figures in the defamation context makes little sense where the speech at issue is an opinion on matters of public concern, incapable of being proven true or false. The Court makes it more difficult for public figures to recover for defamation because, unlike private individuals, public figures "have voluntarily exposed themselves to increased risk of injury from defamatory falsehood *concerning them*," and usually "enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract *false* *statements.*" *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 344-45 (1974) (emphasis added). But where the speech at issue is an opinion on public issues that states no actual facts about anyone, these rationales do not apply. The speech is not factual, so there is nothing to "counteract" or disprove. And it is not *about* any individual, so the question whether a person voluntarily "assumed the risk" of harmful speech is simply not germane. *Cf. Time*, 385 U.S. at 391 ("Were this a libel action, the distinction which has been suggested between the relative opportunities of the public official and the private individual to rebut defamatory charges might be germane.").

Adopting Petitioner's approach would also lead to the illogical result that offensive speech on matters of public concern which does not describe actual facts about any individual, and is directed to the public at large (as in a picket), would be immune from tort liability in a case by a public figure who suffered emotional distress from viewing the speech, but subject to liability in the same case brought by a private figure. Thus, for example, a private-figure employee of the Vatican Embassy in Washington, D.C. could recover damages from a protestor outside the embassy carrying signs expressing the opinion "Vatican Hides Pedophiles," while the public-figure ambassador living in the embassy could not. *Cf.* Eleanor Goldberg, *A Long Stand Against Sex Abuse; Outside the Vatican Embassy, One Man's Protest Has Continued for 12 Years*, Wash. Post, May 15, 2010, at B2 (discussing protester of sex abuse in Catholic Church who, for 12 years, has carried signs such as "Vatican Hides Pedophiles" outside the Vatican embassy "because he's confident that his presence disturbs the Roman Catholic officials inside"). And a protestor picketing a medical clinic with a sign reading "Abortion Is Murder" would be subject to liability if sued by a private-figure patient entering the clinic, but not if that patient happened to be a public figure. With speech of this kind, there is no rational basis for allowing a private figure to recover, and not a public figure. In either case, allowing damages for such speech would profoundly inhibit debate on public issues, a result incompatible with the First Amendment.[8]

D. Respondents' Speech Was Not "Provably False."

Although Petitioner argues that the Fourth Circuit erred by requiring him to prove the falsity of Respondents' speech, he does not challenge that court's ultimate conclusion that the speech was not false because it did not describe actual facts about him or any individual. Indeed, in neither lower court did Petitioner assert that the speech expressed on the picket signs was factual or false, and he never cross-appealed the district court's ruling that the "epic" contained no defamatory statements because it was Respondents' "religious opinion." (Pet. App. 66a.) Thus, the "falsity" of Respondents' speech is not an issue in this Court.

In any event, the Fourth Circuit correctly held that none of the speech is provable as false. To provide

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[8] For this reason, Petitioner's argument that opinions on matters of public concern can be punished in tort where the plaintiff does not have "some reasonable relationship" to the public issue does not withstand scrutiny. (Pet'r Br. 38.) Unsurprisingly, no court has ever adopted such an approach. By definition, speech on public issues which does not describe actual facts about an individual is not *about* anybody.

"assurance that public debate will not suffer for lack of 'imaginative expression' or the 'rhetorical hyperbole' which has traditionally added much to the discourse of our Nation," the First Amendment protects statements "that cannot 'reasonably [be] interpreted as stating actual facts' about an individual." *Milkovich*, 497 U.S. at 20 (alteration in original) (citations omitted). Thus, this Court held that a statement in a news article describing a plaintiff's negotiating position as "blackmail" was protected rhetoric, not a factual statement accusing the plaintiff of committing a crime, because "even the most careless reader must have perceived that the word was no more than rhetorical hyperbole, a vigorous epithet used by those who considered [the plaintiff's] negotiating position extremely unreasonable." *Greenbelt Coop. Publ'g Ass'n, Inc. v. Bresler*, 398 U.S. 6, 14 (1970). Similarly, the Court has held that a nonunion plaintiff could not recover damages for statements referring to him as a "scab"—"'*a traitor to his God, his country, his family and his class*'"—as no reasonable reader would have understood this as charging him with committing the offense of treason. *Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers, AFL-CIO v. Austin*, 418 U.S. 264, 268, 285-87 (1974) (citation omitted). Rather, the statement was "merely rhetorical hyperbole, a lusty and imaginative expression of the contempt felt by union members towards those who refuse to join." *Id.* at 286.

Respondents' speech here contained only such rhetoric. The picket signs did not refer to Petitioner or any other individual (except the Pope) by name, and statements like "You're Going to Hell," "God Hates You," and "Thank God for Dead Soldiers," while offensive, rhetorically expressed Respondents' religious opinion. None of the statements could be proved or disproved, or described as true or false.

The same is true with the "epic," as even the district court concluded in dismissing Petitioner's defamation claim. Statements that Petitioner raised his son "for the devil" and taught him "to defy his Creator, to divorce, and to commit adultery" (the only statements Petitioner contended in district court were actionable (V App. 1212-13)), are best understood as the "sort of loose, figurative, or hyperbolic language which would negate the impression" that the writer was stating fact. *Milkovich*, 497 U.S. at 21; *see also Austin*, 418 U.S. at 285-86. As for the remainder of the "epic," statements such as the Catholic Church is a "satanic" "pedophile machine"; America ("the United States of Sodom") is a "filthy" country; the Maryland legislature is like the "Taliban"; and the other similar statements are Respondents' subjective beliefs, not verifiable statements of fact.

The "general tenor" of the "epic" further negates any impression that it is describing actual facts about Petitioner or his family. *Milkovich*, 497 U.S. at 21. The "epic" is replete with Bible passages discussing sin and other religious matters, and was posted on WBC's website—not the sort of publication where one reasonably would expect assertions of fact, rather than religious belief, to be discussed. As the Fourth Circuit concluded: "[Respondents] utilized distasteful and offensive words, atypical capitalization, and exaggerated punctuation, all of which suggest the work of a hysterical protestor rather than an objecttive reporter of facts." (Pet. App. 39a.)[9]

E. Remand Is Required If The Court Determines Only Some Of The Speech Is Protected.

As explained above, all of the speech in this case is constitutionally protected. But if the Court concludes that only some, but not all, of the speech is protected, it should not enter judgment for Petitioner, but should remand for a new trial.

Over Respondents' objections, the jury was permitted to consider all of Respondents' speech, and it returned a general verdict which did not indicate the precise statements on which it based its verdict. Thus, even if the Court deems some speech unprotected, liability in this case could have been based on speech that is clearly protected (statements such as "America is Doomed" and "God Hates

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[9] Applying the constitutional principle that offensive opinions on matters of public concern cannot be punished in tort without proof of falsity will not leave states powerless to protect private figures "intentionally harmed by expressive conduct," as Petitioner contends. (Pet'r Br. 45.) Provably false statements, even on matters of public concern, are still a proper subject of tort liability. *Hepps*, 475 U.S. at 776. And if a defendant commits separate, independently tortious acts while speaking, the fact that the speech was of public concern would not insulate the defendant from liability for those acts. *See Claiborne*, 458 U.S. at 933-34. Further, if the speech at issue is "of exclusively private concern," then "the constitutional requirements do not necessarily force any change in at least some of the features of the common-law landscape." *Hepps*, 475 U.S. at 775. Finally, as the Fourth Circuit pointed out, states can regulate speech through content-neutral laws which impose reasonable time, place, and manner restrictions. *See Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

America"). In that event, remand for a new trial would be required. *Bresler*, 398 U.S. at 11 ("[W]hen 'it is impossible to know, in view of the general verdict returned' whether the jury imposed liability on a permissible or an impermissible ground 'the judgment must be reversed and the case remanded.'" (citations omitted)).

II. THERE IS NO "CAPTIVE AUDIENCE" ISSUE IN THIS CASE

Petitioner asserts that even if Respondents' "*speech alone* would be entitled to First Amendment protection in other circumstances, Mr. Snyder is entitled to governmental protection from the Phelpses' conduct because he was a captive audience at his son's funeral." (Pet'r Br. 45.) This argument fails.

First, the issue was neither raised in, nor decided by, the lower courts in this case. Accordingly, the Court should decline to consider it. *See Pa. Dep't of Corrections v. Yeskey*, 524 U.S. 206, 212-13 (1998).

Second, Petitioner was not "captive." "Captive audience," as used in First Amendment cases, refers to individuals who, as a practical matter, "cannot avoid" the objectionable speech. *Frisby v. Schultz*, 487 U.S. 474, 487 (1988). Thus, a person subjected to targeted picketing in his home is "captive" because "[t]he resident is figuratively, and perhaps literally, trapped," with no means of avoiding the speech. *Id.* Similarly, in a "confrontational setting[]," an unwilling listener approached within eight feet for counseling or protest purposes could, in some sense, be considered "captive." *Hill v. Colorado*, 530 U.S. 703, 717 (2000). Here, however, at 1000 feet, Respondents were *three football fields* from St. John's Church. Far from being "captive," the testimony is that Petitioner did not *see* Respondents' picket signs at the time of the demonstration.

Third, the "captive audience" concept has no application to the tort judgment here. The Court's analysis of "captive audience" arises in connection with its evaluation of whether a content-neutral statute imposes a reasonable time, place, and manner restriction on speech. *Frisby*, 487 U.S. at 487-88 (content-neutral statute prohibiting residential picketing); *Hill*, 530 U.S. at 719-35 (content-neutral statute prohibiting approaching within eight feet of unwilling listener for certain purposes). Aside from the fact that no statute is at issue in this case, the jury verdict here in no sense rested on "content neutrality"—the jury was invited to, and did, impose liability because it found the content of Respondents' message "outrageous" and "offensive." *Cf. Boos v. Barry*, 485 U.S. 312, 321 (1988) (holding that statute prohibiting speech critical of foreign governments was content based because it "focuses *only* on the content of the speech and the direct impact that speech has on its listeners").

Moreover, unlike statutes that give notice of specific "time, place, and manner" limits that permit speakers to act accordingly, the jury here imposed a post-hoc $11.9 million punishment on Respondents' speech because (presumably), in addition to the content, it found the location at which Respondents chose to speak (1000 feet from the church) objectionable. This despite the fact that (a) Respondents coordinated with local law enforcement before the picket and picketed only where the police told them they could stand, and (b) the distance at which Respondents stood would have complied with the vast majority of the state "funeral protest" statutes cited by the State Attorneys General *amici*, including the law subsequently passed by the Maryland legislature, which prohibits picketing only within 100 feet of a memorial service, *see* Md. Code Ann., Crim. Law § 10-205(c).[10]

If the statutory analogy is appropriate at all, it highlights the constitutional problems with the jury verdict here. A statute prohibiting "offensive" speech on matters of public concern within 1000 feet of a church would never pass constitutional muster under this Court's precedents. *See, e.g.*, ***Boos***, 485 U.S. at 334 (striking down statute prohibiting displaying within 500 feet of foreign embassy any sign that tends to bring a foreign government into "public disrepute"); ***Madsen v. Women's Health Ctr., Inc.***, 512 U.S. 753, 774-75 (1994) (striking down statute prohibiting picketing within 300 feet of homes of abortion clinic staff). But, unless tort law is limited by the First Amendment in the manner discussed in Part I above, a state could regulate indirectly through tort what it would be unable to regulate through statute. *Cf. New York Times*, 376 U.S. at 277 ("What a State may not constitutionally bring about by means of a criminal statute is likewise beyond the reach of its civil law of libel."). Even the threat of liability, even if none were actually imposed, impermissibly chills the constitutional right to peacefully express opinions on matters of public concern, and "the pall of fear and timidity imposed upon those who would give voice to public criticism is an atmosphere in which the First Amendment freedoms cannot survive." *Id.* at 278.

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[10] Indeed, of the 34 laws cited by the State Attorneys General *amici* prohibiting picketing or other activities within a certain distance of a funeral service, Respondents' 1000-foot distance would have complied with *33* of them—in most cases, by many multiples of the allowable distance. Four states prohibit certain activities within 100 feet of a funeral (*e.g.*, Maryland, *supra*); six within 150 feet (*e.g.*, Kan. Stat. Ann. § 21-4015a(e)(1)); two within 200 feet (*e.g.*, Utah Code Ann. § 76-9-108(2)(d)); six within 300 feet (*e.g.*, N.C. Gen. Stat. § 14-288.4(a)(8)); fourteen within 500 feet (*e.g.*, Okla. Stat. tit. 21, § 1380(D)); one within 1000 feet (*see* Tex. Penal Code Ann. § 42.055(b)); and one within 1500 feet (*see* Mont. Code Ann. § 45-8-116(1)).

CONCLUSION

For the reasons stated above, the Court should affirm the decision of the Fourth Circuit.

Respectfully submitted,

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v.

FRED W. PHELPS, SR., SHIRLEY L. PHELPS-ROPER; REBEKAH A. PHELPS-DAVIS; AND WESTBORO BAPTIST CHURCH, INC., RESPONDENTS

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR THE AMERICAN LEGION AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the First Amendment permits state tort law to redress wrongs such as invasion of privacy and intentional infliction of emotional distress caused by targeted picketing of funerals.

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INTRODUCTION AND INTEREST OF THE *AMICUS CURIAE*[*]

Whether by protesting or proselytizing, the right to express one's religious views lies at the heart of the First Amendment. Indeed, this is a principle for which many members of amicus The American Legion have risked their lives—and for which many military personnel, like petitioner's son, Lance Corporal Matthew Snyder, have died. Contrary to the decision below, however, this case is not about the right to protest or proselytize. It is about the state's long-established interest in shielding private citizens from "focused picketing"—which, as this Court has noted, is "fundamentally different from more generally directed means of communication that may not be completely banned." *Frisby* v. *Schultz*, 487 U.S. 474, 483, 487 (1988); see also *Rowan* v. *U.S. Post Office Dept.*, 397 U.S. 728 (1970).

What justifies regulation in such cases is not the speech's content, but "the offensive and disturbing nature of the *form* of the communication"—its "verbal or [visual] assault" on those targeted. *Frisby*, 487 U.S. at 488 (emphasis added); see also *Erzoznik* v. *Jacksonville*, 422 U.S. 205, 210 n.6 (1975). As this Court has recognized, where picketing is narrowly directed, it "inherently and offensively intrudes." *Frisby*, 487 U.S. at 487. That is because it is "a mixture of conduct and communication," and thus is "qualitatively different from other modes of communication." *DeBartolo Corp.* v. *Fla. Gulf Coast Bldg. &*

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[*] The parties have consented to the filing of this brief. No counsel for any party has authored this brief in whole or part, and no person or entity other than the *amicus* has made a monetary contribution to its preparation or submission. See Rule 37.6.

Constr. Trades Council, 485 U.S. 568, 580 (1988) (citations omitted); *Hughes* v. *Superior Court*, 339 U.S. 460 (1950). Accordingly, it is now well settled that picketing that might be protected in some contexts *may* be limited by reasonable time, place, and manner restrictions in particularly sensitive contexts such as homes and hospitals. *E.g.*, *Frisby*; *Rowan; Hill* v. *Colorado*, 530 U.S. 703, 716 (2000).

Funerals are at least as sensitive and historically sacrosanct as homes and hospitals. As the Court has recognized, "[b]urial rites and their counterparts have been respected in almost all civilizations from time immemorial"—long before the First Amendment. *Nat'l Archives & Records Admin.* v. *Favish*, 541 U.S. 157, 168 (2004). And funerals are unique in still other ways: The intense sorrow and anguish caused by loss of a loved one has not yet subsided, the sense of finality is acute, and there are no "do-overs." Indeed, the hallowed nature of funerals is confirmed by the fact that Congress and some 44 States have enacted laws specifically regulating funeral protests.

By the reasoning of the Fourth Circuit, these laws—and similar regulation of funeral picketing under state tort law—are unconstitutional. But as this Court has recognized, highly targeted picketing is not pure speech. And it is of no moment that the restrictions at issue here are imposed by tort law rather than by ordinance. Rather, as Justice Frankfurter famously put it, where picketing is at stake "[i]t is not for this Court to deny to a State the right, or even to question the desirability, of fitting its law to a concrete situation through the authority given * * * to its courts" under the common law. *Hughes*, 339 U.S. at 467 (citation omitted).

Military funerals are of special importance to amicus The American Legion which, ever since its charter by Congress in 1919, has had a powerful interest in honoring fallen servicemen. See 36 U.S.C. §§ 21701-21708 (2000). As the largest veterans organization in the United States, comprising almost 2.5 million current and former soldiers, the Legion is charged by Congress with "preserv[ing] the memories and incidents of the * * * great hostilities fought to uphold democracy. 36 U.S.C. § 21702(3). And that includes the memories of veterans like Matthew Snyder, fallen in the line of duty. Because the decision below is likely to make it more difficult to honor fallen soldiers like Mr. Snyder appropriately, the American Legion has a powerful interest in seeing that decision overturned.

STATEMENT OF THE CASE

As this Court has recognized, "[f]amily members have a personal stake in honoring and mourning their dead and objecting to unwarranted public exploitation that * * * tends to degrade the rites and respect they seek to accord to the deceased person who was once their own." *Favish*, 541 U.S. at 167. Here, rather than seeking to honor the fallen, the respondents attended Matthew Snyder's funeral so that they could *picket* it with abusive signs—signs containing such statements as "Thank God for dead soldiers" and "Fag troops." *Snyder* v. *Phelps*, 580 F.3d 206, 212 (4th Cir. 2009).

Although respondents stayed some distance from the church, and petitioner (Snyder's father) did not see the signs until a subsequent newscast, the assault at the funeral had done its damage. At a time when his grief was most acute, respondents subjected petitioner to lasting emotional injury. "I think about the sign [*i.e.*, 'Thank God for dead soldiers'] every day of my life," testified petitioner. *Id.* at 213. "I [had] one chance to bury my son and they took the dignity away from it. I cannot re-bury my son. And for the rest of my life, I will remember what they did to me[;] and it has tarnished the memory of my son's last hour on earth." *Ibid.*

After a trial on whether respondents committed torts of intrusion upon seclusion and intentional infliction of emotional distress, a jury returned a verdict against respondents of $10.9 million, later reduced by the court to $5 million. *Id.* at 211. In Maryland, to recover for intentional infliction of emotional distress, a plaintiff must show that the defendants, engaged in specific conduct that was "intentional or reckless," "extreme and outrageous," causing "severe emotional distress. *Vauls* v. *Lambros*, 553 A.2d 1285, 1289 (Md. Ct. Spec. App. 1989). Intrusion upon seclusion is shown by establishing an "[u]nreasonable intrusion upon the seclusion of another." *Household Finance Corp.* v. *Bridge*, 250 A.2d 878, 882 (Md. Ct. Spec. App. 1969 (quotation omitted).

In post-judgment motions, respondents protested that their picketing could not be subject to tort liability because it was absolutely protected under the First Amendment. *Snyder* v. *Phelps*, 533 F. Supp.2d 567, 576 (D. Md. 2008). The district court rejected this contention, citing this Court's precedents "recogniz[ing] that there is not an absolute First Amendment right for any and all speech directed by private individuals against other private individuals," and that "[c]onduct," in particular, "remains subject to regulation for the protection of society." *Id.* at 577, 579 (citations omitted).

The court of appeals reversed. The court acknowledged that "there is no categorical constitutional defense for statements of 'opinion,'" yet paradoxically asserted that "the First Amendment will *fully protect* statements that cannot reasonably [be] interpreted as stating actual facts." 580 F.3d at 218 (emphasis added; citation omitted). Although the court further recognized that "governmental bodies are entitled to place reasonable and content-neutral time, place, and manner restrictions on activities that are otherwise constitutionally protected" (*id.* at 226), the court never considered whether the tort law here could be viewed as imposing such restrictions.

SUMMARY OF ARGUMENT

Although it disclaimed doing so, the Fourth Circuit effectively ruled that respondents' speech was automatically protected simply because it constituted opinion. As this Court's precedents make plain, however, even opinion can be regulated in certain limited contexts—most importantly, where combined with offensive conduct—so long as the government's interests are strong enough and the regulations are appropriately tailored. By failing to consider this possibility, the Fourth Circuit mistakenly struck down critical common-law shields that protect private citizens from focused picketing, which is fundamentally different from more generally directed means of communication that may not be completely banned. *Frisby*, 487 U.S. at 487.

I. In the unusually sensitive context of a funeral, where mourners are faced with the powerful speech-conduct mixture of targeted picketing, these tort-law shields are valid time, place, and manner restrictions. Because the Maryland courts did not develop or apply the torts at issue to express any disagreement with the message of respondents' picketing (or any other particular message), they are content-neutral. And under this Court's precedents, the fact that a facially content-neutral restriction may incidentally affect some speakers but not others is of no constitutional moment. *E.g.*, *Boos* v. *Barry*, 485 U.S. 312, 345 (1988); *Renton* v. *Playtime Theatres, Inc.*, 475 U.S. 41, 47-48 (1986).

Moreover, as applied here, Maryland's invasion-of-privacy and intentional-infliction-of-emotional-distress torts address vitally important governmental interests—a survivor's personal stake in honoring and mourning his dead and preserving the character and memory of the deceased. *Favish*, 541 U.S. at 168 The torts at issue shield that interest in a narrowly tailored fashion—because that interest could not be achieved as effectively absent tort liability. See *Ward* v. *Rock Against Racism*, 491 U.S. 781, 798 (1989). Respondents also have adequate alternative means of communication, including picketing *not* targeted at the funeral itself, as well as all manner of print and telecommunications media. See *Frisby*, 487 U.S. at 483-484.

Indeed, the tort law restrictions at issue here merely limit the *manner* in which respondents may speak and the *place* where they may picket, and they do so for only a few hours of *time*. They thus operate as valid time, place, and manner restrictions.

II. Because there is no meaningful constitutional distinction between state positive law and state tort law in this context, the Fourth Circuit's approach would threaten the validity of democratically enacted statutes regulating picketing and passed by some 44 States and Congress.

First, if speech is protected merely because it constitutes opinion, as the decision below seems to have held, the democratically enacted picketing statutes of virtually every state and the federal government are necessarily unconstitutional. As we will explain, those statutes take diverse approaches to regulating funeral picketing—from banning fighting words, to creating buffer zones, to forbidding conduct based in part on tort-like standards. But if opinion trumps all, it does not matter *how* the statutes regulate picketing; they all are invalid because they interfere with expression of opinion.

Second, even under a narrower reading of the Fourth Circuit's approach—such that expressions of opinion can be regulated, just not by tort law—many state statutes would remain in jeopardy because, as noted, they frequently invoke tort law standards.

The Court should prevent both results—sweeping or more narrow invalidation of funeral picketing statutes—by reversing the decision below and declaring that the First Amendment *does* permit state tort law to redress wrongs such as invasion of privacy and intentional infliction of emotional distress caused by the targeted picketing of funerals.

ARGUMENT

I. Even if the speech here was opinion, it was not protected by the First Amendment.

As noted, the court of appeals held that "the First Amendment will *fully* protect statements that cannot reasonably [be] interpreted as stating actual facts about an individual." 580 F.3d at 218 (emphasis added; citation omitted). As we now show, the court's apparent ruling that respondents' picketing was absolutely protected simply because it was opinion was error. Moreover, the state-law prohibitions on intentional infliction of emotional distress and invasion of privacy acted as valid time, place and manner restrictions on respondents' actions.

A. Free Speech Clause analysis does not end merely because the speech at issue constitutes opinion.

It is axiomatic that "[t]he rights of free speech * * * while fundamental in our democratic society, still do not mean that everyone with opinions or beliefs to express may address a group at any public place and at any time. The constitutional guarantee of liberty implies the existence of an organized society maintaining public order, without which liberty itself would be lost in the excesses of anarchy." *Cox* v. *Louisiana*, 379 U.S. 536, 554 (1965). Thus, even in a public forum, expressions of opinion can be limited by "reasonable restrictions on the time, place, or manner of [the] protected speech, provided the restrictions are justified without reference to the content of the regulated speech, * * * are narrowly tailored to serve significant governmental interests, and * * * leave open ample alternative channels for communication of the information." *Ward*, 491 U.S. at 791 (citation omitted); see also *Grayned* v. *City of Rockford*, 408 U.S. 104, 115 (1972) (same).

The question, therefore, is whether the restrictions here are reasonable and appropriately tailored. As this Court has instructed:

> The *nature of a place, the pattern of its normal activities*, dictates the kinds of regulations of time,

> place, and manner that are reasonable. Although a silent vigil may not unduly interfere with a public library, making a speech in the reading room almost certainly would. * * * *The crucial question is whether the manner of expression is basically compatible with the normal activity of a particular place at a particular time.*"

Grayned, 408 U.S. at 232 (emphasis added).

Here, the Fourth Circuit failed to ask this "crucial question"—whether targeted picketing is "compatible with the normal activity of a [funeral]." *Ibid.* As shown below, it is not. And the Fourth Circuit erred in assuming that it could avoid this question simply because the statements at issue were opinions. Indeed, if expressions of opinion were absolutely protected in all circumstances, a speaker would be able to evade reasonable time, place, and manner restrictions—even restrictions on "fighting words"—simply by couching his statements as opinions. *Cf., e.g.*, *R.A.V.* v. *St. Paul*, 505 U.S. 377, 386 (1992); *Cohen* v. *California*, 403 U.S. 15, 20 (1971); *Chaplinsky* v. *New Hampshire*, 315 U.S. 568, 572 (1942).

B. As shown by this Court's decision in *Hughes*, valid restrictions against targeted picketing are permissibly established, as here, by the common law.

Like fighting words, targeted picketing is *not* compatible with the normal activity of a funeral, and the jury here did no harm to the First Amendment by saying so. That is because the torts at issue here "are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication." *Frisby*, 487 U.S. at 481. We address each requirement in turn.

1. There can be no doubt that imposing tort liability here serves an *important governmental interest*—indeed, a compelling interest—which this Court has already held has "deep[] roots in the common law": namely, "rights in the character and memory of the deceased" and the state interest in "protect[ing] [the] feelings" of the survivors, which "may * * * be * * * violated by improper[] interfere[nce]." *Favish*, 541 U.S. at 168-169.

As this Court noted in *Favish*, "[f]amily members have a personal stake in honoring and mourning their dead and objecting to unwarranted public exploitation that, by intruding upon their own grief, tends to degrade the rites and respect they seek to accord to the deceased person who was once their own." *Ibid.* While these words were written to protect survivors from having photographs of their dead loved ones obtained under the Freedom of Information Act (see *ibid.*), they apply with full force here.

Petitioner, too, has a personal stake in honoring and mourning his son and in preventing funeral activities that tend to degrade the rites and the respect he sought to accord to his fallen son. But by appearing at Matthew's funeral to make abusive comments such as "Thank God for dead soldiers" and "Fag troops," respondents seriously compromised petitioner's "personal stake in honoring and mourning [his] dead." *Ibid.* "I [had] one chance to bury my son and they took the dignity away from it," petitioner testified. "I cannot re-bury my son. And for the rest of my life, I will remember what they did to me[;] and it has tarnished the memory of my son's last hour on earth." 580 F.3d at 213. This is the epitome of the kind of "unwarranted public exploitation" that this Court decried in *Favish*.

At a minimum, petitioner's "rights in the character and memory of the deceased" are far greater here than in most other contexts. See *Ward*, 491 U.S. at 792 (park); *Grayned*, 408 U.S. 118-119 (public school); *Cox*, 379 U.S. at 562 (courthouse); *Burson*, 504 U.S. at 206-208 (polling places). Indeed, the "right of privacy of the living"—the right to have "their feelings" "protect[ed]" and "to prevent a violation of their own rights in the character and memory of the deceased" (*Favish*, 541 U.S. at 168-169)—runs at least as deep as privacy rights in the home (see *Frisby*, *Rover*) or the hospital (see *Madsen*, *Hill*).

To be sure, homes and hospitals are unique places of rest. See *Frisby*, 487 U.S. at 484 ("the unique nature of the home, the last citadel of the tired, the weary, and the sick"; "the one retreat to which men and women can repair to escape") (citation omitted); *Hill*, 530 U.S. at 728-729 ("hospitals" are "where patients and relatives alike often are under emotional strain and worry * * * where the patient and [her] family need a restful, uncluttered, relaxing, and helpful atmosphere"). But the grave is a *final* place of rest, and a funeral is a proceeding at least as hallowed than any respite in a home or a hospital. Once desecrated, the funeral, like the grave, can never fully be restored—in part because a funeral happens only once. If it is spoiled, that is that. The mourners' memories of the event will be forever tarnished. Thus, if the government has an important interest in protecting the sanctity of the home and hospital—as it surely does—it has at least as powerful an interest in protecting the sanctity of a funeral.

In short, in punishing a "deliberate verbal * * * assault" at a funeral, there is no question that tort law protects a government interest that is substantial. *Hill*, 530 U.S. at 716 (quoting *Erznonznik*, 422 U.S. 205, 210-211). Indeed, that interest is compelling.

2. The tort liability at issue here is also *narrowly tailored*, meaning it "promotes a substantial governmental interest that would be achieved less effectively absent the regulation." *Ward*, 491 U.S. at 798. This does not require that a proscription adopt "the *least* restrictive or least intrusive means of doing so." *Ibid.* Indeed, even "[a] complete ban can be narrowly tailored" so long as "each activity within the proscription's scope is an appropriately targeted evil." *Frisby*, 487 U.S. at 485.

Here, imposing tort liability directly promotes "protect[ion] of [Matthew's] memory" and helps "prevent a violation of [his father's] rights in [Matthew's] character and memory" more effectively than the absence of liability. *Favish*, 541 U.S. at 168-169; *Ward*, 491 U.S. at 798. Indeed, even if respondents themselves would have picketed just the same despite the risk of a large money judgment, the presence of a tort remedy certainly promotes the interest identified in *Favish* more effectively than the *absence* of such a remedy. See *Ward*, 491 U.S. at 798.

Nor does it matter to "tailoring" analysis that the damages award here is provided by the common law, rather than by ordinance. As noted, this Court disposed of that question in *Hughes*, which, as we explain further below, upheld state tort remedies against targeted picketing. In so doing, the Court held that "[t]he fact that California's policy is expressed by the judicial organ of the State rather than by the legislature we have repeatedly ruled to be immaterial." 339 U.S. at 467 (Frankfurter, J.) (collecting cases). And the Court went on to note that "[i]t is not for this Court to deny to California that choice from among all the weapons in the armory of the law." *Ibid.* (citation omitted). After all, "[r]egulation may take the form of legislation * * * or be left to the ad hoc judicial process * * *. Either method may outlaw an end not in the public interest or merely address itself to the obvious means toward such end. The form the regulation should take and its scope are surely matters of policy and, as such, within a State's choice." *Id.* at 468; *cf. San Diego Bldg. Trades Council* v. *Garmon*, 359 U.S. 236, 247 (1959) (regulation "can be as effectively exerted through an award of damages as through some form of preventive relief"; "[t]he obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy"); *Geier* v. *Am. Honda Motor Co., Inc.*, 529 U.S. 861, 886 (2000).[1]

Finally, applying tort law here does not "run[] afoul of [this Court's] long standing refusal to allow damages to be awarded because the speech in question may have an adverse emotional impact on the audience." *Hustler* v. *Falwell*, 485 U.S. 46, 55 (1988). The reason is that picketing is "inseparably something more and different" than publishing a magazine article. *Hughes,* 339 U.S. at 464. "Publication in a newspaper, or by distribution of circulars," such as occurred in *Hustler*, "may convey the same information or make the same charge," "[b]ut the very purpose of a picket line is to exert influences, and it produces consequences, different from other modes of communication. The loyalties and responses evoked and exacted by picket lines are unlike those flowing from appeals by the printed word." *Id.* at 465. Thus, this Court has "emphatically" rejected the notion that the First Amendment "afford[s] [the] same kind of freedom to those who would communicate ideas by conduct such as * * * picketing * * * as [it does] to those who communicate ideas by pure speech." *Cox*, 379 U.S. at 555; accord *DeBartolo*, 339 U.S. at 580. By imposing liability for expressive conduct, rather than pure speech, state tort law recognizes the unique dangers of targeted picketing repeatedly recognized by this Court.

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[1] *Hughes* was decided a decade *after Cantwell* v. *Connecticut*, 310 U.S. 296 (1940), which held that the First Amendment trumped Connecticut's too "general and indefinite" tort of "breach of the peace." *Id.* at 308. Moreover, *Cantwell* involved pure speech, which, as we explain below, is "qualitatively different" from the picketing at issue here. *DeBartolo*, 485 U.S. at 580 (quoting *Babbitt* v. *Farm Workers*, 442 U.S. 289, 311 n.17 (1979)); see also *Hughes*, 339 U.S. at 465 ("Picketing, not being the equivalent of speech as a matter of fact, is not its inevitable legal equivalent.").

The torts here, moreover, have the virtue of *not* effecting a "complete ban" on targeted picketing, which was upheld in *Frisby*, 487 U.S. at 485. Instead, these torts are subject to standards that provide an acceptable "flexibility and reasonable breadth." *Grayned*, 408 U.S. at 110 (citation omitted); see also *Ward*, 491 U.S. at 794-795 ("perfect clarity and precise guidance have never been required"). Specifically, intentional infliction of emotional distress requires establishing conduct that is both "extreme and outrageous" and causes "severe" emotional distress, *Vauls*, 553 A.2d at 458—which, as we have shown, is an acceptable standard where speech is mixed with conduct. See also *United States* v. *O'Brien*, 391 U.S. 367, 376 (1968) ("when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms," and regulation of such expressive conduct need only "further[] [an] important or substantial governmental interest" that is "unrelated to the suppression of free expression" and be "no greater than is essential to the furtherance of that interest"). And an intrusion upon seclusion creates liability only where the intrusion was unreasonable. *Bridge*, 250 A.2d at 882. Because these torts "promote[] a substantial governmental interest that would be achieved less effectively absent the regulation," *Ward*, 491 U.S. at 798, the torts here are narrowly tailored.

3. Next, the tort laws here are *content-neutral*. In determining content neutrality, "the controlling consideration" is "the government's purpose"—"whether the government has adopted a regulation of speech because of disagreement with the message it conveys." *Ward*, 491 U.S. at 791.

Here, the torts of intrusion upon seclusion and intentional infliction of emotional distress are undoubtedly content-neutral. By their very nature, they apply equally to any conduct that violates their standards, with no exemptions or exceptions hinting at favoritism or hostility toward a particular viewpoint. *Cf. United States* v. *Playboy Entmt. Group, Inc.*, 529 U.S. 803, 878 (2000) (statute "focuses only on the content of [the] speech," which "is the essence of content based regulation"); *Burson* v. *Freeman*, 504 U.S. 191, 197 (1992) (statute "not * * * facially content-neutral" because, "[w]hether individuals may exercise their free speech rights * * * depends entirely on whether their speech is related to a political campaign"); *Boos* v. *Barry*, 485 U.S. 312, 345 (1988) (clause "readily" shown as content-based because "justified only by reference" to "whether * * * picket signs are critical of [targeted] foreign government or not"). Respondents, moreover, presented no evidence that the verdict here was based upon the content of their speech rather than the time, place and manner of its delivery.

Moreover, a restriction that is facially content-neutral will be upheld even though it may have incidental effects on some speakers or messages but not others. *Ibid*; see also ***Renton***, 475 U.S. at 47-48. Thus, "[t]he fact the [restriction] [here] covered people with a particular viewpoint does not itself render the [restriction] content or viewpoint-based." ***Madsen*** v. ***Women's Health Ctr.***, 512 U.S. 753, 762-763 (1994). As in ***Madsen***, there is no "suggestion in this record that [Maryland] would not equally restrain similar conduct" by picketers with messages different from the Phelps, and "none of the restrictions [imposed by the court at issue] were directed at the contents of [the Phelps's] message." *Ibid.*

4. Lastly, the torts at issue here leave open more than adequate *alternative channels of communication*. As respondents themselves have noted in a different case, "funeral[s] [are] the *occasion* of [their] speech, not its *audience*." ***Phelps-Roper*** v. ***Strickland***, 539 F.3d 356, 372 (6th Cir. 2008) (emphasis added). But even if funerals were respondents' most effective means to reach their perceived audience—a point they also have expressly disclaimed (*ibid.*)—"the First Amendment does not guarantee the right to communicate one's views * * * in *any* manner that may be desired." *Heffron* v. *Int'l Soc. for Krishna Consciousness, Inc.* 452 U.S. 640, 647 (1981) (emphasis added).

Indeed, unlike the total ban on targeted picketing enforced in *Frisby*, enforcing the torts here would not *categorically* bar respondents from anything. They could not be held liable at all for non-targeted picketing—say, at the Pentagon. Nor would they be categorically barred from speaking in the public areas surrounding churches or cemeteries. They may also publish articles, go door-to-door, distribute literature, and speak on radio or television. See *Frisby*, 487 U.S. at 485. Indeed, respondents could engage in the very same picketing—at the very same location—provided they ceased doing so before any members of the funeral party arrived or began after the party left.

One might thus think of the restriction imposed by the tort law here as a "buffer zone" of time—a few hours before and after the funeral itself. Given that reality, respondents have "ample alternative channels of communication." *Ibid.*

* * * * *

Under this Court's decisions, the Fourth Circuit halted its First Amendment analysis too soon upon deciding the speech here constituted opinion. It should have gone further, and asked whether the tort actions at issue here "are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample channels of communication." *Frisby*, 487 U.S. at 481. As we have shown, the answer to that question is yes, and the decision below must therefore be reversed.

II.The Fourth Circuit's approach would likely invalidate numerous funeral picketing statutes, thereby placing many more funerals at risk of disruption.

Another reason to reverse the decision below is that its approach to the First Amendment would likely invalidate numerous statutes passed by governments across the Nation. And that is true both under the Fourth Circuit's apparent holding that statements of opinion are entitled to absolute First Amendment protection, and the court's narrower suggestion that, although some time, place, and manner restrictions may be valid, tort remedies cannot be.

1. Not only is there a federal statute regulating funeral picketing, 38 U.S.C. § 2413, but no fewer than *44* states—every state other than Alaska, Arizona, Hawaii, Nevada, Oregon and West Virginia—have statutes restricting funeral picketing.[2] As one com-

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[2] Ala. Code § 13A-11-17; Ark. Code Ann. § 5-71-230; Cal. Penal Code § 594.35; Colo. Rev. Stat. §§ 13-21-126, 18-9-101, -106(3),-107(3),- 108(2),-117,-125; Conn. Gen. Stat. § 53a-183c; Del. Code Ann. Tit. 11, § 1303; Fla. Stat. Ann. §§ 871.01-.02; Ga. Code Ann. § 16-11-34.2; Idaho Code Ann. § 18-6409(2); 720 Ill. Comp. Stat. 5/26-6; In. Code §§ 35-45-1-3, -2-1; Iowa Code Ann. § 723.5; Kan. Stat. Ann. § 21-4015a; Ky. Rev. Stat. Ann. §§ 525.055, .060,.145,.155; La. Rev. Stat. Ann. § 14:103; Me. Stat. 17-A § 501-A; Md. Code Ann., Crim. Law § 10-205; M.G.L.A. 272 § 42A; Mich. Camp. Laws §§ 123.1111-.1115; Minn. Stat. § 609.501; Miss. Code Ann. § 97-35-18; Mo. Rev. Stat. §§ 578.501--.502; Mont. Code Ann. III. 45, ch. 8, pt. I; Neb. Rev. Stat. §§ 28-1320.01-.03; N.H. Rev. Stat. § 44:2-b; N.J. Stat. Ann. § 2C:33-8.1; N.M. Stat. Ann. § 30-20B-1--5; N.Y. CLS Penal § 240.21; N.C. Gen. Stat. Ann. § 14-288.4; N.D. Cent. Code, § 12.1-31-01.1; Ohio Rev. Code Ann. § 3767.30; Okla. Stat. Ti. 21, § 1380; 18 Pa. Cons. Stat. Ann § 7517; R.I. Gen. Laws § 11-11-1; S.C. Code Ann. § 16-17-525; S.D. Cod. Laws §§ 22-13-17 to

mentator has observed, these statutes take different, sometimes overlapping approaches to regulating funeral picketing. See Christina E. Wells, *Privacy & Funeral Protests*, 87 N.C. L. Rev. 151, 163-174 (2008).[3]

But all of these statutes have one thing in common: They are in jeopardy as applied to the kind of picketing at issue here if this Court follows the broad approach taken below—that is, holding that expressions of opinion are protected no matter how a state attempts to regulate them. Indeed, if this Court followed what the Fourth Circuit *did*—striking down a regulation of funeral picketing on the ground that opinion trumps all—then the decision would be a jurisprudential wrecking ball, effectively requiring invalidation of every one of the 44 statutes that regulate funeral picketing. That is because *every* protest would undoubtedly involve some expression of opinion, thereby precluding the application of any of these statutes in a manner that would prohibit it.

2. Even if the Court were to adopt the narrower approach suggested by the opinion below—that opi-

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-20; Tenn. Code Ann. § 39-17-317; Tex. Penal Code Ann. §§ 42.04, .055; Utah Code Ann. § 76-9-108; Vt. Stat. Ann. Ti. 13, § 377 I; Va. Code Ann. § 18.2-415; Wash. Rev. Code Ann. § 9A.84.030; Wis. Stat. § 947.011; Wyo. Stat. Ann. § 6-6- 105.

[3] *E.g.*, 38 U.S.C. § 2413(a)(2)(A)(ii)(2006) ("willfully making or assisting in the making of any noise or diversion that disturbs or tends to disturb the peace or good order of the funeral" within 150 feet of an entrance to cemetery property); Ill. Comp. Stat. 5/26-6(C)(2) (West 2008) ("fighting words or actual or veiled threats"); N.Y. Penal Law § 240.21 ("unreasonable noise or disturbance"); Fla. Stat. § 721.02; Tex. Penal Code Ann. § 42.055(b) ("picketing within 1,000 feet of a facility or cemetery being used for a funeral service").

nion can validly be regulated, but that tort laws cannot constitute valid time, place, and manner restrictions—a number of statutes would still be jeopardized. That is especially true of those that employ tort-like standards or are based on regulation of the same types of harms as are redressed by the torts of invasion of privacy and intentional infliction of emotional distress.

For example, in language reminiscent of the torts at issue here, Oklahoma prohibits certain targeted funeral picketing because "picketing of funerals causes emotional disturbance and distress to grieving families who participate in funerals." 21 Okla. Stat. Ann. § 1380.A.1.c. And Idaho subjects to criminal penalties "[e]very person who maliciously and willfully" so much as "*disturbs the dignity or reverential nature* of any funeral, memorial service, funeral procession, burial ceremony or viewing of a deceased person." Idaho Code § 18-6409(2) (emphasis added). Thus, these States regulate funeral picketing based on the same rationale that animates Maryland's common law tort of intentional infliction of emotional distress, which regulates "intentional or reckless" conduct that is "extreme and outrageous" and causes "severe emotional distress." *Vauls*, 553 A.2d at 1289.

The threat to existing state statutes is amplified by the fact that, as Professor Wells has noted, "[*m*]*ost states* regulate peaceful funeral protests based on mourners' privacy interests"—indeed, "the preambles or statutory statements of several laws explicitly invoke the privacy of grieving families. Wells, *supra*, 87 N.C. L. Rev. at 173 (emphasis added). Kansas, for example, recognizes the "substantial privacy interests in funerals." Kan. Stat. Ann. § 21-4015a (2009). And other statutes recognize families' right to "peacefully and privately mourn," Neb. Rev. Stat. § 28-1320.01 (2007); see also Pa. Cons. Stat. Ann. § 7517(a)(2)(West. Supp. 2008) (right to "mourn privately and in peace"). Such laws call to mind Maryland's tort barring invasions of privacy, which is based on the same rationales: preventing an "[u]nreasonable intrusion upon the seclusion of another." *Bridge*, 250 A.2d at 882 (quotation omitted).

If Maryland's tort actions fail as valid time, place, and manner restrictions, therefore, it is not difficult to predict that statutes depending on similar principles may fail for the same reasons. The Constitution constrains enforcement of both positive law and common law, both of which are forms of state action. *E.g.*, *New York Times v. Sullivan*, 376 U.S. 254, 265 (1964). True, these statutes sometimes contain additional provisions setting further spatial and temporal bounds on funeral picketing. But by overlaying these restrictions with tort-type rationales, the statutes will likely become subject to some of the same attacks pressed here—for example, that they are content-based and not narrowly tailored. And insofar as the statutes rest on similar rationales, the decision here will have implications for their validity.

For the reasons we have explained, however, such torts *can* be confined to constitutional limits, and the same is true of the many statutes that reflect similar regulatory approaches. The Court's decision in this case should make that plain by reversing the decision below and prescribing proper limits on regulation of funeral picketing, not unjustified ones like those imposed by the Fourth Circuit.

CONCLUSION

This Court has already recognized that "[b]urial rites have been respected in almost all civilizations from time immemorial"—long before the First Amendment. *Favish*, 541 U.S. at 169. And just as the decision in *Frisby* allowing regulation of picketing "rested upon the unique nature of the home," *Hill*, 530 U.S. at 752, 744-745 (Scalia, dissenting) (citation omitted), so too this Court's decision upholding the application of Maryland tort law in the context of funeral picketing can and should rest upon the unique nature of funerals. Relying on these principles, and on *Hughes*, which shows that picketing may validly be regulated by tort law, the Court should reverse the decision below. If the Court does *not* reverse, as we have shown, as many as 44 statutes will be on the chopping block. That result would seriously undermine the government's important interest in the sanctity of funerals, particularly funerals for fallen soldiers such as Matthew Snyder.

For all of these reasons, the judgment below should be reversed.

Respectfully submitted.

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AMICUS CURIAE BRIEF

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ALBERT SNYDER,

Petitioner,

v.

FRED W. PHELPS, SR., *et al.*,

Respondents.

**ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT**

BRIEF OF AMICUS CURIAE THE ANTI-DEFAMATION LEAGUE IN SUPPORT OF NEITHER PARTY

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INTEREST OF *AMICUS CURIAE*

The Anti-Defamation League ("ADL") submits this brief as *amicus curiae* in support of neither petitioner nor respondents.[1] ADL seeks the Court's indulgence as it offers a more extensive description of its interest in this case than is perhaps customary. ADL does so because an understanding of its unique combination of interests adds context to the substantive arguments that ADL advances here. This case implicates freedom of expression, religious liberty, and the state interest in providing redress to the victims of hate speech, all of which are matters of deep and longstanding concern to ADL.

ADL was organized in 1913 to advance good will and mutual understanding among Americans of all creeds and races. Its charter holds that it was founded "to stop the defamation of the Jewish people and to secure justice and fair treatment to all citizens alike." ADL fights anti-Semitism and all forms of hate and bigotry, defends democratic ideals, and protects the civil rights of all persons.

As a civil rights advocacy organization, ADL is committed to the preservation of our democratic freedoms and the constitutional rights that gird them, including the rights of freedom of thought and expression. ADL recognizes that these First Amendment protections extend to ideas that are intellectually indefensible and to speech that is morally obnoxious—such as the ideas that the respondents espouse, and the speech with which they express those ideas. Nevertheless, time and again ADL has advocated, in this Court and elsewhere, for robust protection for freedom of speech. ADL acknowledges the wisdom of Justice Holmes's observation that "if there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought—not free thought for those who agree with us but freedom for the thought we hate." *United States v. Schwimmer*, 279 U.S. 644, 654-55 (1929) (Holmes, J., dissenting).

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[1] ADL gave at least ten days' notice of intention to file this brief to counsel of record for the parties. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund its preparation or submission. No person other than ADL or its counsel made a monetary contribution intended to fund its preparation or submission.

At the same time, ADL recognizes that words can inflict pain and suffering upon the innocent and can even threaten the physical safety of targeted persons and groups. As ADL National Director Abraham Foxman observed earlier this year, "hate speech cannot be ignored. Words of hate, and the world's disregard of that hate, paved the road to Auschwitz."[2] ADL has a deep, indeed foundational, commitment to the idea that the world must never forget the monumental tragedies that were set in motion by hate speech, slurs, and propaganda.

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[2] *Thoughts on International Holocaust Day*, January 26, 2010, http://cgis.jpost.com/Blogs/foxman/.

ADL therefore has a long history of monitoring, exposing, and fighting against all forms of hate speech, as well as hate crimes. What is known historically as ADL's "First Case" was the lynching in 1915 of Leo Frank, a Jew, after his unjust conviction for murder and the commutation of his death sentence to life imprisonment, a lynching that was carried out by a mob spurred on by hate speech and rampant anti-Semitism. Today, ADL's struggle against hate speech extends to the new and emerging forms such speech has taken, such as extremist websites and cyber-bullying.[3] In this connection, ADL notes that it has for many years monitored and reported upon the activities of respondents and has been unflinching in its condemnation of their speech and conduct as anti-Semitic, as bigoted, and as homophobic.[4]

Finally, ADL is particularly concerned with protecting individuals from persecution or oppression because of their faith. ADL has therefore long championed religious liberty and opposed government entanglement in religious issues. For decades, ADL has defended the principle, as expounded by this Court in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 642 (1943), that "no official, high or petty, can prescribe what shall be orthodox" in matters of religion and conscience.[5]

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[3] This history includes the filing of *amicus curiae* briefs before this Court in cases involving hate speech and hate crimes, such as *Virginia v. Black*, 538 U.S. 343 (2003), *Wisconsin v. Mitchell*, 508 U.S. 476 (1993), and *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992).

[4] *See* ADL's encyclopedic report *Extremism in America*, http://www.adl.Org/learn/ext_us/ (last visited April 14, 2010)(profiling the Westboro Baptist Church and condemning it as a "virulently homophobic, anti-Semitic hate group.")

ADL's distinctive history and mission endow it with a keen appreciation for the tensions that can arise between and among the cherished principles of free speech and religious liberty. ADL has a profound interest in ensuring that conflicts between these important rights and interests are appropriately mediated. And ADL therefore has a concomitant interest in ensuring that this Court does not embark upon a project of this delicacy and sensitivity unless the case before it provides a necessary and proper occasion for doing so. While welcoming this Court's guidance as to how such conflicting interests should be resolved, and while deeply sympathetic to petitioner's personal suffering, ADL submits this *amicus curiae* brief in order to urge this Court to recognize that this is *not* such a case.

SUMMARY OF ARGUMENT

The petition for a writ of certiorari poses three broadly framed questions for this Court's review.

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[5] ADL has filed *amicus curiae* briefs with the Court in cases raising these issues, dating back to such seminal cases as *Lemon v. Kurtzman*, 403 U.S. 602 (1971), *Sherbert v. Verner*, 374 U.S. 398 (1963), and *Engel v. Vitale*, 370 U.S. 421 (1962).

Careful analysis reveals, however, that the undisputed facts of this case and the decision of the Court of Appeals do not actually raise the certified questions or require this Court to address them. Indeed, it is possible that, on closer examination, this Court may conclude that the writ was improvidently granted. But, however it affects the ultimate disposition of this case, the central point is that the facts at issue and the decision below offer an extremely poor vehicle for rendering the type of expansive ruling the petition for a writ of certiorari and the certified questions appear to invite.

* * *

ARGUMENT

THIS CASE DOES NOT PRESENT SQUARELY THE QUESTIONS SET OUT IN THE PETITION FOR WRIT OF CERTIORARI AND THIS CASE IS A POOR VEHICLE FOR ADDRESSING THOSE QUESTIONS

A. The First Certified Question.

The first certified question is whether this Court's decision in "*Hustler Magazine, Inc. v. Falwell* appl[ies] to a private person versus another private person concerning a private matter." There are several fundamental flaws with this framing of the issue before the Court.

As an initial matter, it is simply inaccurate to characterize the communications here as pertaining to "a private matter." Respondents' communications were directed toward an issue of extraordinary public interest: the death of an American marine in the service of his country. The public interest in this issue is not changed by the fact that very few people—indeed, perhaps no one beyond the members of the Phelps family themselves—would agree with respondents' opinions on the subject.

Furthermore, the first certified question rests upon an erroneous portrayal of the decision below. In fact, this Court's decision in *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988), actually does very little work in the reasoning of the United States Court of Appeals for the Fourth Circuit. A careful review of its opinion, *Snyder v. Phelps*, 580 F.3d 206, 217-22 (4th Cir. 2009), shows that the Court of

Appeals cited *Hustler Magazine* only in passing, basing its decision instead on this Court's decisions regarding protection for hyperbolic speech in cases such as *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990), *Letter Carriers v. Austin*, 418 U.S. 264 (1974), and *Greenbelt Coop. Publ'g Ass'n. v. Bresler*, 398 U.S. 6 (1970). It would be both odd and unnecessary for this Court to explore the contours of one of its decisions—particularly a decades-old decision addressing important First Amendment issues in a manner long thought to be settled law—in the context of a case that does not directly implicate that precedent.

These failings of the first certified question are not mere technicalities. To the contrary, they signal a fundamental problem with this Court's review of this case. As noted, this case does not squarely present the issues identified in the first certified question. But the more worrisome concern is that, in light of the undisputed facts, it does not appear that this case presents *any* issue that warrants this Court's energies and attention.

This likely explains why the petition struggles to identify the exact issue presented for review. At some points, the petition suggests that the issue is whether petitioner can maintain a claim for intentional infliction of emotional distress based on respondents "flaunting" of signs that were disrespectful to his son's memory and that disrupted the funeral. *Snyder v. Phelps*, No. 09-751, Petition for a Writ of Certiorari (hereinafter, "Petition") at 4. The undisputed facts, however, are that respondents' protest took place more than 1000 feet away from the funeral, the funeral was conducted without incident, and petitioner was not contemporaneously aware of the "disrespectful" signs during the funeral, and saw them only later in the day when he watched a television news report. *Snyder v. Phelps*, 580 F.3d at 212.

In other passages, the petition suggests that the issue is whether petitioner can maintain a claim for intentional infliction of emotional distress based upon respondents' mere presence at the funeral, which petitioner claims "created a negative and circus-like atmosphere." Petition at 3. The undisputed facts contravene this framing of the issue as well. As the Fourth Circuit observed, the record shows that respondents complied with all local ordinances and police directions and conducted their protest in a peaceful manner. *Snyder v. Phelps*, 580 F.3d at 212.

The undisputed facts of this case thus make it a singularly poor vehicle for attempting to reconcile the tension that can exist between the right to freedom of expression protected by the First Amendment and the interest in emotional well-being protected by state tort law. That project should be reserved for a case that squarely presents the conflict and that requires the Court to engage in such a highly nuanced and complex analysis. This is not that case.

B. The Second Certified Question.

The second certified question is whether "the First Amendment's freedom of speech tenet trump[s] the First Amendment's freedom of religion and peaceful assembly." Again, ADL submits that the question rests on an erroneous view of the facts and the law and is not joined by this case.

With respect to the facts, the question implies that petitioner was deprived of his right freely to exercise his religion because he could not assemble with his loved ones and conduct a memorial service for his son. But, as discussed above, the undisputed facts show he did just that. There is no evidence that respondents' speech—insensitive and deplorable as it may have been—prevented or interrupted the service.

With respect to the law, this case does not involve a conflict between constitutional doctrines, contrary to what the question implies. Respondents are not state actors; they are not constrained by principles of freedom of religion and assembly; and petitioner (correctly) did not base his claim against them on the premise that they violated his rights under the First Amendment. Rather, petitioner claimed that respondents were liable under state tort law. This Court should not venture into the byzantine complexity of trying to reconcile competing constitutional rights in a case that does not require such an exercise. *See, e.g.*, *Morse v. Frederick*, 551 U.S. 393, 431 (2007) (Breyer, J., concurring in part and dissenting in part) ("[I]f it is not necessary to decide more, it is necessary not to decide more."), quoting *PDK Labs., Inc., v. Drug Enforcement Admin.*, 362 F.3d 786, 799 (D.C. Cir. 2004) (Roberts, J., concurring in part and concurring in judgment).

C. The Third Certified Question.

Finally, the third certified question is whether "an individual attending a family member's funeral constitute[s] a captive audience who is entitled to state protection from unwanted communication." This case does not provide an occasion for considering this question, either.

As noted earlier, the undisputed facts indicate that petitioner was not exposed to the "unwanted communication"—the statements made on respondents' picket signs and website—while "attending a family member's funeral." ***Supra*** at 7-8. To the contrary, "it was established at trial that Snyder did not actually see the [picket] signs until he saw a television program later that day with footage of the Phelps family at his son's funeral." ***Snyder v. Phelps***, 580 F.3d at 212.

This Court should not explore the complicated question of who qualifies as a member of a "captive audience"—and whether that status has any impact on the dimensions of First Amendment protections—in a case that does not require the Court to do so.

* * *

CONCLUSION

At some point, this Court will have occasion to identify and reconcile the tensions that can exist between freedom of expression, freedom of conscience, freedom of assembly, freedom of religion, and the governmental interest in providing civil remedies and criminal punishments against hate crimes and hate speech. In the proper case, this Court's wisdom and guidance regarding the reconciliation of these tensions may prove essential to the orderly functioning of our democracy. But this Court should navigate those narrow jurisprudential straits in a case that presents the tensions squarely, that provides a proper factual context for their exploration, and that leaves the Court with no alternative but to rule. With all due respect to petitioner and to the decision to grant *certiorari* here, ADL respectfully submits that *Snyder v. Phelps* is not that case.

Respectfully submitted,

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AMICUS
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BRIEF

Supreme Court, U.S.
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No. 09-751

Supreme Court of the United States

ALBERT SNYDER,

Petitioner,

v.

FRED W. PHELPS, SR., *et al.*

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

Brief *Amicus Curiae* of the Center for Constitutional Jurisprudence In Support of Neither Party Suggesting Reversal

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QUESTIONS PRESENTED

The Fourth Circuit reversed a jury determination in favor of Albert Snyder ("Snyder") for the intentional harm perpetrated against him by Fred W. Phelps, Sr., Westboro Baptist Church, Incorporated, Rebekah A. Phelps-Davis and Shirley L. Phelps-Roper (collectively, "Phelps"). Snyder's claim arose out of Phelps' intentional acts at Snyder's son's funeral. Specifically the claims were: (1) intentional infliction of emotional distress, (2) invasion of privacy and (3) civil conspiracy. These claims were dismissed by the Fourth Circuit notwithstanding that (a) *Hustler Magazine, Inc. v. Falwell* does not apply to private versus private individuals; (b) Snyder was a "captive" audience; (c) Phelps specifically targeted Snyder and his family; (d) Snyder proved that he was intentionally harmed by clear and convincing evidence; and (e) Phelps disrupted Snyder's mourning process. The Fourth Circuit's decision gives no credence to Snyder's personal stake in honoring and mourning his son and ignores Snyder's right to bury his son with dignity and respect. Three questions are presented:

1. Does *Hustler Magazine, Inc. v. Falwell* apply to a private person versus another private person concerning a private matter?

2. Does the First Amendment's freedom of speech tenet trump the First Amendment's freedom of religion and peaceful assembly?

3. Does an individual attending a family member's funeral constitute a captive audience who is entitled to state protection from unwanted communication?

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Other

Stephen R. McAllister, "Funeral Picketing Laws and Free Speech," 55 *University of Kansas Law Review* (April, 2007) 575 9

Interest of *Amicus Curiae* [1]

Amicus curiae, the Center for Constitutional Jurisprudence, is an educational, litigation and advocacy program in constitutional law and jurisprudence. Founded in 1999 as the public interest litigation arm of the Claremont Institute for the Study of Statesmanship and Political Philosophy, the Center provides legal representation and litigation support through the work of students and attorneys in cases of constitutional significance, advancing through its strategic litigation the Institute's mission of restoring the principles of the American Founding to their rightful and preeminent authority in our national life.

SUMMARY OF ARGUMENT

First Amendment principles of freedom of speech in a traditional public forum can accommodate the traditional deference and respect shown for the dead when funeral processions or funerals briefly occupy some portion of that public forum, under standards set by state law protecting funerals from disruption. The split in the circuits presented in this action favors the analysis of the Sixth Circuit Court of Appeals in *Phelps-Roper v. Strickland* (6th Cir. 2008) 539 F.3d 356, which upheld funeral speech laws as reasonable time, place and manner regulations.

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[1] The Center for Constitutional Jurisprudence files this brief with the consent of all parties. The letters granting consent have been previously filed or are being filed concurrently. Counsel for a party did not author this brief in whole or in part. No person or entity, other than *amicus curiae*, its members, or its counsel made a monetary contribution specifically for the preparation or submission of this brief.

ARGUMENT

FIRST AMENDMENT PRINCIPLES AND FEDERALISM SHOULD PERMIT STATES TO RECOGNIZE PRIVATE FUNERALS AS CULTURALLY AND CONSTITUTIONALLY APPROPRIATE CONTEXTS FOR LEGAL RESTRICTIONS ON DISRUPTIVE SPEECH IN A TRADITIONAL PUBLIC FORUM.

The principal problem with the First Amendment speech analysis of the Fourth Circuit Court of Appeals in this action is that it fully protects speech in a traditional public forum, the streets and sidewalks where the Respondents demonstrated, without adequate consideration of the context, a private funeral, and the strong American -- indeed universal -- cultural tradition of showing respect for the dead and deference to mourning relatives and friends associated with private funerals and funeral processions.

In protecting speech in traditional public forums like public streets and sidewalks, states should be permitted to take into consideration the traditional, cultural exception to such public expression associated with the practice which has been observed in human societies from time immemorial of allowing families to conduct private funerals without disruption. States should be allowed under the First Amendment and principles of federalism to legislate against interference with or disruption of private funerals, including providing causes of action in tort for intentional infliction of emotional distress as in the present action, and similar state law regulations, by legal prohibitions against knowingly, intentionally or willfully disrupting or disturbing private funerals by speech or expressive conduct, whether or not the substantive content of that speech or conduct is directed at the funeral or its participants.

The Fourth Circuit opinion, *Snyder v. Phelps* (4th Cir. 2009) 580 F.3d 206, focused on whether the offensive content of the Respondents' messages was directed personally at the Petitioner or his son, whose funeral was being conducted at the time of the demonstrations. Finding that it was not so directed, the Court of Appeals invoked First Amendment protection for the Respondents' speech and disallowed the state law remedies for disruption of the Petitioner's funeral to be implemented.

> [T]he First Amendment will fully protect "statements that cannot 'reasonably [be] interpreted as stating actual facts' about an individual."

580 F.3d at 218, citing and quoting *Milkovich v. Lorain Journal Company* (1990) 497 U.S. 1 at 20 (alteration in original), quoting *Hustler Magazine, Inc. v. Falwell* (1988) 485 U.S. 46 at 50.

The finding of the Court of Appeals that the content of the Respondent demonstrators' speech was not directed against the Petitioner or his son is doubtful on the evidence presented, but even if a reasonable observer could find that the Respondents' messages were not directed personally against the Petitioner or his son and were speech on important issues of public concern, it remains indisputable that the Petitioner and his son were selected by the

Respondents to be the targets of their demonstration because of they are members of classes of people that the Respondents wanted to attack, specifically the military and Roman Catholics, and because the Respondents intentionally wanted to target and disrupt the funeral. *Id.*, 580 F.3d at 211-212.

But the rule of constitutional law in this case should not turn on whether the Respondents' speech targeted the Petitioner or his son individually, or as members of protected or unprotected classes, or not at all. The constitutional focus in this action should be on the *event* targeted by the Respondent's speech, a private funeral. *Id.*, 580 F.3d at 211 (Respondents "issued a news release . . . announcing that members of the Phelps family intended to come to Westminster, Maryland, and picket the funeral").

"[P]rotected speech is not equally permissible in all places and at all times." *Cornelius v. NAACP Legal Defense & Educational Fund, Inc.* (1985) 473 U.S. 788, 799.

The fact that private funerals may temporarily intersect areas of public property that are traditional public forums should not convert them into public occasions for disruptive expression protected by the First Amendment if states want to guard funerals and grieving families from such distressing, disrespectful and reprehensible conduct and expression.

Personal privacy receives constitutional protection under the First Amendment, even in traditional public forums, under narrow circumstances. In *Frisby v. Schultz* (1988) 487 U.S. 474, this Court held that a local ordinance that prohibited "picketing focused on, and taking place in front of, a particular residence" satisfied intermediate First Amendment scrutiny because it was content neutral, "narrowly tailored to serve a significant government interest" and left open "ample alternative channels of communication." 487 U.S. at 482. The significant government interest was identified in *Frisby* as "the protection of residential privacy." 487 U.S. at 484. "The State's interest in protecting the well-being, tranquility, and privacy of the home is certainly of the highest order in a free and civilized society." *Id.*, citation omitted. "[E]ven if some [residential] picketers have a broader communicative purpose, their activity nonetheless inherently and offensively intrudes on residential privacy. The devastating effect of targeted picketing on the quiet enjoyment of the home is beyond doubt." 487 U.S. at 486. "The offensive and disturbing nature of the form of communication banned by the [residential picketing] ordinance thus can scarcely be questioned." 487 U.S. at 487.

Private funerals that temporarily intersect or occupy public streets or other locations that represent traditional public forums deserve a similar, narrow First Amendment exception to freedom of speech, like the protection of the public interest in the privacy and tranquility of the home.

This Court has expressed in another context that respect for the dead and for the experiences, emotions and memories of the people who mourn their passing can represent a compelling government interest. In *National Archives and Records Administration v. Favish* (2004) 541 U.S. 157, this Court found that refusal to release information about an investigation into an "apparent suicide" pursuant to a Freedom of Information Act request was justified under the provision of the statute that protected against disclosures that constitute an "unwarranted invasion of personal privacy." 541 U.S. at 160. This Court found that privacy interests concerning the dead and the family members of the deceased were deserving of protection even against important public rights to freedom of information, rights closely akin to the freedom of speech asserted in this action.

> [W]e think it proper to conclude from Congress' use of the term "personal privacy" that it intended to permit family members to assert their own privacy rights against public intrusions long deemed impermissible under the common law and in our cultural traditions.
> . . .
> Burial rites or their counterparts have been respected in almost all civilizations from time immemorial.

541 U.S. at 167-168.

This Court noted that "[t]he ritual burial of the dead" has been practiced "from the very dawn of human culture and . . . in most parts of the world," and that "[F]uneral rites . . . are the conscious cultural forms of one of our most ancient, universal, and unconscious impulses." 541 U.S. at 168, citations omitted.

> They [funeral rites] are a sign of the respect a society shows for the deceased and for the surviving family members. The power of Sophocles' story in *Antigone* maintains its hold to this day because of the universal acceptance

> of the heroine's right to insist on respect for the body of her brother.

Id., citation omitted.

> Family members have a personal stake in honoring and mourning their dead and objecting to unwarranted public exploitation that, by intruding upon their own grief, tends to degrade the rites and respect they seek to accord to the deceased person who was once their own.

Id.

"[S]urviving relatives of a deceased person" are entitled to laws to "protect his memory, . . . to protect their feelings, and to prevent a violation of their own rights in the character and memory of the deceased." 541 U.S. at 168-169, citation omitted.

For the same reasons and by the same reasoning this Court should recognize the authority of states and the federal government to protect the important public interest in maintaining respect for the dead and the memories and experiences of mourning friends and families of the deceased by legal protection of funeral rites against the assaults of insults, mockery, heckling and disruption at issue in this action.

States should be permitted under principles of federalism to enact laws that restrict, penalize or impose tort liability on people who engage in disruptive expression even in traditional public forums when such speech or expressive conduct targets or knowingly takes place in the presence of a private funeral.

In *Phelps-Roper v. Strickland* (6th Cir. 2008) 539 F.3d 356, the Respondents in this action sued to have an Ohio law banning picketing associated with funerals or funeral processions declared facially unconstitutional under the First Amendment, but the Sixth Circuit Court of Appeals upheld the law. The Ohio statute prohibited "protest activities that disrupt or disturb a funeral, burial service, or funeral procession" from being conducted within 300 feet of a funeral for one hour before until one hour after a funeral or burial service. 539 F.3d at 358. Violation of the law is a misdemeanor. 539 F.3d at 359. The Sixth Circuit found that the law was a valid, reasonable and content-neutral regulation of the time, place and manner of speech under the First Amendment because it advanced a significant public interest, the privacy of funerals. 539 F.3d at 360-373.

A contrary result was reached by the Eighth Circuit Court of Appeals in another case involving the Respondents in this action, *Phelps-Roper v. Nixon* (8th Cir. 2008) 545 F.3d 685. In *Phelps-Roper v. Nixon* the court held that no privacy interest other than the home can outweigh the right to free speech in a traditional public forum. "[T]he government has no compelling interest in protecting an individual from unwanted speech outside of the residential context." 545 F.3d at 692, citations omitted. An unreported District Court decision enjoining enforcement of a municipal ordinance against funeral picketing was issued in *Phelps-Roper v. City of Gladstone, Mo.* (W.D. Mo. 2009), Not Reported in F.Supp.2d, 2009 WL 995565, on the grounds of the binding Eighth Circuit precedent of *Phelps-Roper v. Nixon.*

The conflict between the circuits presented in this action should be resolved against the Fourth Circuit opinion in this action, *Snyder v. Phelps, supra,* and against the Eighth Circuit reasoning in *Phelps-Roper v. Nixon, supra,* and in favor of the analysis of the Sixth Circuit in *Phelps-Roper v. Strickland, supra.*

Forty states and the federal government had statutes regulating speech and conduct in areas surrounding private funerals as of 2007, including locations that are traditional public forums. Stephen R. McAllister, "Funeral Picketing Laws and Free Speech," 55 *University of Kansas Law Review* (April, 2007) 575, 576, 579-583.

These state and federal laws protect important public interests that satisfy applicable First Amendment criteria and should be held by this Court to be constitutionally valid.

Conclusion

Traditional public forums are not absolute First Amendment locations that must put up with disruptive expression when the forum is being used temporarily for such solemn and important public purposes as private funerals. This Court has acknowledged the constitutional authority of states under principles of federalism and the First Amendment to protect the privacy of the home from forms of expressive intrusion, including by demonstrators engaging in free speech in a traditional public forum, the public streets, and the same protection is appropriate for funerals and funeral processions, when provided under applicable state or federal statutory law.

The traditional public forum doctrine of the First

Amendment should recognize not only the tradition of freedom of speech but also the tradition of permitting people to bury and mourn their dead in peace and dignity.

Rights to freedom of speech in traditional public forums have existed in the Anglo-American consciousness "immemorially," since "time out of mind," and "from ancient times" as "part of the privileges, immunities, rights, and liberties of citizens," *Hague v. C.I.O.* (1939) 307 U.S. 496, 515, but such rights have always coexisted with another ancient and traditional right, the right to mourn and bury our dead without public interference or disruption, with solemn dignity and sacred respect.

Respectfully submitted,

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AMICUS
CURIAE
BRIEF

No. 09-751

IN THE

Supreme Court of the United States

ALBERT SNYDER,
Petitioner,

v

FRED W. PHELPS, SR., *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF *AMICI CURIAE* THE FOUNDATION FOR INDIVIDUAL RIGHTS IN EDUCATION AND LAW PROFESSORS ASH BHAGWAT, DAVID POST, MARTIN REDISH, NADINE STROSSEN, AND EUGENE VOLOKH

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INTEREST OF *AMICI CURIAE* [1]

Pursuant to Rule 37 of the Supreme Court Rules, the Foundation for Individual Rights in Education ("FIRE") and law professors submit this brief as *amici curiae* in support of respondents.

FIRE is a national secular, non-partisan, 501(c)(3) non-profit educational and civil liberties organization working to defend and promote individual rights at our nation's colleges and universities. These rights include freedom of speech, legal equality, due process, religious freedom, and sanctity of conscience—the essential qualities of individual liberty and dignity. FIRE believes that, for our nation's colleges and universities to best prepare students for success in our modern liberal democracy, the law must remain clearly and vigorously on the side of student rights. During its more than ten years of existence, FIRE has advocated on behalf of the fundamental liberties of campus organizations in multiple states and on multiple campuses.

Ash Bhagwat is Professor of Law at the University of California, Hastings College of the Law. From 2002 to 2004, he served as Associate Academic Dean at Hastings. Professor Bhagwat teaches and writes in the field of constitutional law, with a special interest in the First Amendment. As an educator, former public university administrator, and free speech scholar, he has a special interest in questions involving freedom of speech on public university campuses.

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[1] All parties have consented to the filing of this brief Counsel of record for all parties received notice, at least 10 days prior to the due date, of the *amici curiae*'s intention to file this brief. Pursuant to Supreme Court Rule 37 6, no counsel for a party authored this brief *amici curiae* in whole or in part, and no person or entity, other than *amici*, made a monetary contribution to the preparation or submission of this brief.

David G. Post is the I. Herman Stern Professor of Law at the Beasley School of Law at Temple University. He is the author of two books and numerous scholarly and popular articles focused on the new regulatory challenges posed by the emergence of the Internet as a global communications forum, and in particular on means of protecting and preserving the freedoms of expression, association, and thought in the face of those challenges.

Martin H. Redish is the Louis and Harriet Ancel Professor of Law and Public Policy at Northwestern University School of Law For the past 40 years, he has published numerous articles and three books on the theory and doctrine of free expression.

Nadine Strossen is Professor of Law at New York Law School. She served as President of the American Civil Liberties Union from 1990 to 2008, and she has also served in leadership positions in other organizations that focus on freedom of speech issues. She teaches, writes, and lectures extensively on constitutional law issues, with a special focus on freedom of speech, including on public university campuses.

Eugene Volokh is Gary T. Schwartz Professor of Law at UCLA School of Law, and the author of *The First Amendment and Related Statutes: Problems, Cases and Policy Arguments* (3d ed. 2008) as well as many articles on First Amendment law.

Both FIRE and the assembled law professors believe that were the Court to hold that "outrageous" speech may lead to liability (setting aside situations where the speech falls within a well-established First Amendment exception), the already significant problem of censorship on our nation's campuses would worsen dramatically.

SUMMARY OF ARGUMENT

The vast majority of Americans find respondents' speech in this case to be uncommonly contemptible. But many more ideas than just the Phelpsians' would be endangered if the decision in this case allows the speech to be restricted on the grounds that it is outrageous and distressing. This danger is likely to be especially great on college campuses.

If the government acting as sovereign may impose liability on allegedly outrageous and severely distressing speech, even when it relates to matters of public concern, then public universities would be equally able to discipline their students for allegedly outrageous commentary. Student speech in newspapers, Web pages, demonstrations, leaflets, and conversations would become subject to restriction, based on its content and the viewpoint that it expresses. This would dramatically endanger free discussion at academic institutions.

Nor will this danger be eliminated if a new "outrageous and distressing" speech exception covers only speech that deals with private figures, speech that happens near (in time or place) to religious rituals, or speech that involves a supposedly captive audience. The danger can only be avoided if the Court reaffirms that, because "'[o]utrageousness' in the area of political and social discourse has an inherent subjectiveness about it which would allow [government actors] to impose liability on the basis of the [actors'] tastes or views," "[a]n 'outrageousness' standard thus runs afoul of our longstanding refusal to allow damages to be awarded because the speech in question may have an adverse emotional impact on the audience." *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 55 (1988).

ARGUMENT

I. Allowing Liability for Supposedly Outrageous and Emotionally Distressing Speech Would Threaten Free Debate on University Campuses

A. If Speech May Lead to Legal Liability, It May Lead to University Discipline

Allowing tort liability for allegedly outrageous and emotionally distressing speech would allow universities to discipline students for such speech as well. Speech that is unprotected even against the government as sovereign is *a fortiori* unprotected against the government as educator. *See, e.g*, *Coll. Republicans at San Francisco State Univ. v. Reed*, 523 F Supp. 2d 1005, 1012 (N.D. Cal. 2007).

Already, university speech codes routinely forbid student speech that falls within existing First Amendment exceptions, such as libel and fighting words.[2] If this Court holds that "outrageous" speech that recklessly or purposefully inflicts severe emotional distress may lead to liability, many universities will likely add this category of speech to the prohibitions in their speech codes. And in fact some universities have already borrowed concepts from the intentional infliction of emotional distress tort in crafting their speech codes, likely under the assumption that *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988), leaves room for such speech restrictions in cases not involving public figures.[3]

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[2] *See, e g*, Jackson State University, *Student Decorum Policy* at 2, http://www.jsums edu/studentlife/pdf/decorum pdf (prohibiting "illegal speech," including libel, defamation, and fighting words)

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[3] *See, e.g.*, *McCauley v. Univ. of Virgin Islands*, No. 2005-188, 2009 WL 2634368, at *19 (D.V.I. Aug. 21, 2009), *appeal pending*, No. 09-3735 (3d Cir.) (discussing and upholding against a First Amendment challenge a university speech code that restricted speech that "causes emotional distress"); WASH. ADMIN. CODE § 504-26-222 (LexisNexis 2010) (Washington State University student conduct policy, which bars all "[c]onduct by any means"—which would include speech—"that is severe, pervasive, or persistent, and is of such a nature that it would cause a reasonable person in the victim's position [and actually does cause the victim] substantial emotional distress and [would and does] undermine his or her ability to work, study, or participate in his or her regular life activities or participate in the activities of the university"); Univ. of Okla., Student Code. 2009–2010 tit. 16, ¶ 21, (2009), http://judicial.ou.edu/images/stories/student_codebook20092010.pdf (banning, among other things, "[m]ental harassment, being intentional conduct extreme or outrageous . . . of such a nature that a reasonable person would not tolerate it"), S.D. Bd. of Regents, Student Conduct Code § 2 B.6.a.ii (2009), http://www.sdbor.edu/policy/3-Student_Affairs/documents/3-4.pdf (banning "conduct that is extreme and outrageous exceeding all bounds usually tolerated by polite society and that has the purpose or the substantial likelihood of interfering with another person's ability to participate in or to realize the intended benefits of an institutional activity, employment or resource"). Likewise, concepts borrowed from the emotional distress tort are already part of the academic arguments in favor of speech codes. *See, e.g.*, Jack M. Battaglia, *Regulation of Hate Speech by Educational Institutions: A Proposed Policy*, 31 SANTA CLARA L. REV. 345, 381–82 (1991) ("A student who intentionally or recklessly uses hate speech [any word, gesture, graphic representation, or symbol which reflects hatred, contempt, or

Yet allowing universities to restrict supposedly outrageous student speech (outside the existing exceptions, such as threats) would greatly jeopardize free debate at academic institutions, for six interrelated reasons.

B. The Practical Obstacles to Bringing Emotional Distress Claims Are Lower in University Proceedings

First, while emotional distress lawsuits are expensive for the plaintiffs to litigate and therefore comparatively rare, this constraint does not apply to disciplinary actions by universities. Students, faculty members, or administrators who are outraged and distressed by another student's speech can file complaints that trigger the disciplinary process, without any financial cost to themselves.

Complaints based on supposedly outrageous expression are unfortunately already commonplace on campuses.[4] For example, San Francisco State

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stigmatization by reason of race, ethnicity, national origin, gender, religion, handicap or sexual orientation], under such circumstances that another student is likely to suffer serious emotional distress or be intimidated from full participation in any university activity or program, shall be disciplined. A student shall not be disciplined under this Policy for any conduct which s/he demonstrates has serious literary, artistic, political or scientific value ")

[4] *See, e.g.*, ALAN CHARLES KORS & HARVEY A SILVERGLATE, THE SHADOW UNIVERSITY THE BETRAYAL OF LIBERTY ON AMERICA'S CAMPUSES (1998) (describing the arbitrary and unconstitutional administrative review procedures and speech policies used to punish university students), DONALD ALEXANDER DOWNS, RESTORING FREE SPEECH AND LIBERTY ON CAMPUS (2004) (examining university policies that deprive students of their right to free speech), Azhar Majeed, *Defying the Constitution: The Rise, Persistence, and Prevalence of*

University's College Republicans held an anti-terrorism rally at which they stepped on homemade replicas of Hamas and Hezbollah flags, which contain the word "Allah" in Arabic.[5] Offended students filed charges of "attempts to incite violence and create a hostile environment" and "actions of incivility," prompting a university "investigation" that lasted five months.[6]

Likewise, an undergraduate at the University of Central Florida was charged with "personal abuse" and "harassment" for engaging in electronic communication "intended to . . . cause severe emotional distress" after calling a candidate for student government "a Jerk and a Fool" on social networking website Facebook.com.[7] The student

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Campus Speech Codes, 7 GEO J.L & PUB POL'Y 481 (2009) (analyzing the use of campus speech codes to censor and punish protected student speech), Azhar Majeed, *The Misapplication of Peer Harassment Law on College and University Campuses and the Loss of Student Speech Rights*, 35 J.C U.L. 385 (2009) (discussing the abuse of peer harassment law to restrict students' freedom of speech), Greg Lukianoff, *P C Never Died*, REASON, Feb 2010, *available at* http.//reason.com/archives/2010/01/11/pc-never-died (detailing a university finding—which was later overturned after a public outcry—that an Indiana University-Purdue University Indianapolis student-employee engaged in "racial harassment" by bringing to his workplace a book about the Ku Klux Klan, which as it happens described the defeat of the Klan by Notre Dame students in a 1924 street fight).

[5] *Reed*, 523 F Supp 2d at 1007.

[6] *Id* at 1009

[7] Foundation for Individual Rights in Education, *University of Central Florida Notification of Charge Against Matthew Walston*, http.//www.thefire.org/article/6858 html (letter from Office of Student Conduct detailing charges against student for electronic speech), University of Central Florida, *Rules of*

editor-in-chief of the *Rocky Mountain Collegian*, a Colorado State University student newspaper, was subjected to a formal hearing after using an expletive in an editorial critical of President George W. Bush.[8] At Grand Valley State University in Michigan, members of the College Republicans were charged with "discrimination" following student complaints after the group held a satirical "affirmative action bake sale" on campus.[9] The university's Director of Student Life told *The Grand Rapids Press* that "[t]o do something this offensive is not appropriate."[10]

These are just a few examples of the attempts to silence protected student speech via campus disciplinary proceedings simply because some on campus were outraged by its content; FIRE has seen hundreds more such university actions. If a new "outrageous and distressing speech" exception is recognized, there is good reason to expect that disciplinary complaints based on such speech will become even more routine weapons in university controversies.

Conduct, http://www.osc.sdes.ucf.edu/?id=process_roc (prohibiting "behavior (including written or electronic communication) that could cause severe emotional distress")

[8] Bruce Finley, *CSU Editor Will Face Hearing*, DENVER POST, Sep. 28, 2007

[9] John Leo, *Baking With Fire*, U.S. NEWS & WORLD REPORT, Apr 18, 2005.

[10] Jennifer Ackerman-Haywood & Barton Deiters, *Offended Students Find GOP Bake Sale Tasteless*, GRAND RAPIDS PRESS, Mar 25, 2005.

C. A Wide Range of Speech Might Outrage Administrators or Student Disciplinary Committee Members

Second, a great deal of speech might be labeled "outrageous" by a university administrator, or by a student disciplinary committee staffed by students who volunteer for the task. Publishing the Mohammed cartoons provokes outrage.[11] So does burning an American flag. So might stepping on a Hamas flag, which contains a passage from the Koran. *See supra* Part I.B; Jason Shuffler, *ASI Passes Resolution Against Flag Stomping*, GOLDEN GATE [X]PRESS, Nov. 28, 2006, *available at* http://xpress.sfsu.edu/archives/news/007652.html (reporting on San Francisco State University student government's resolution condemning this as "hateful religious intolerance").

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[11] The Mohammed cartoons have been the subject of continued controversy on campuses across the country. *See, e.g.*, Patricia Cohen, *Yale Press Bans Images of Muhammad in New Book*, N.Y. TIMES, Aug. 12, 2009 (reporting on Yale University's decision to remove Mohammed cartoons from forthcoming Yale University Press book), Nat Hentoff, *'Free Speech' Cries Ring Hollow on College Campuses and Beyond*, USA TODAY, Apr. 18, 2006 (reporting on censorship of Mohammed cartoons at New York University and Century College), Aaron Brown, *Prophet Cartoon on Door Prompts Action*, CHICAGO MAROON, Feb. 17, 2006 (reporting on disciplinary investigation of a student who posted Mohammed cartoon on his dormitory door), David Mendell, *2 Illini Editors Are Suspended*, CHICAGO TRIBUNE, Feb. 15, 2006 (reporting on suspension of student editors of University of Illinois at Urbana-Champaign student newspaper for publishing Mohammed cartoons). It is easy to imagine an exception for "outrageous and severely distressing" speech being invoked to silence such publications.

So might saying that "affirmative action results in a situation where minorities are competing with people who are better prepared to be there," Editorial, *Smith's Challenge; New Justice Now Has a Broader Constituency*, DALLAS MORNING NEWS, Nov. 18, 2002, at 16A (condemning this statement as "outrageous"), especially since this statement could be seen as applying to an offended person personally and not just to minorities generally So might arguing that a government program director is unfit for a job because she is not a U S. citizen. *See Dominguez v. Stone*, 638 P.2d 423, 426–27 (N.M. Ct App. 1981) (concluding that such speech may lead to liability under the intentional infliction of emotional distress tort). So might staging a student musical parodying *The Passion of the Christ*,[12] or holding a student performance of a play that depicts Jesus Christ as a gay man.[13] So might constructing a symbolic "graveyard" of miniature crosses to protest abortion.[14]

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[12] *Plays* [sic] *Sparks Controversy at WSU*, ASSOC PRESS, July 17, 2005, *available at* http //www.wenatcheeworld com/news/2005/jul/17/plays-sparks-controversy-at-wsu/ (reporting on student protests against satirical "Passion of the Musical" performed by Washington State University student).

[13] *Threats Teach Tarleton State Students the Wrong Lesson*, FORT WORTH STAR-TELEGRAM, Mar 28, 2010 (reporting on cancellation of student production of "Corpus Christi" after threats were received).

[14] Lindsay VanQuaethem, *Pro-Life Display Vandalized*, MISSOURI STATE STANDARD, Oct 7, 2008, *available at* http://media.www the-standard.org/media/storage/paper1059/news/2008/10/07/News/ProLife Display Vandalized-3473334 shtml (reporting on student vandalism of campus pro-life group's cross display).

So might a letter to a newspaper in favor of a government policy of retaliating against civilians in a war zone. *See Citizen Publ'g Co. v. Miller*, 115 P.3d 107 (Ariz. 2005) (reversing a lower court decision that refused to dismiss an emotional distress tort claim based on such a letter). So might harsh, *Hustler-v.-Falwell*-like ridicule of a university professor, a student activist, or someone who was convicted of a crime but is nonetheless viewed sympathetically by the university disciplinary authority, perhaps because of the political valence of the crime.

The speakers in any of these examples might know that their statements are likely to inflict such distress. If liability for supposedly outrageous statements that recklessly inflict severe emotional distress is allowed, then all the speech mentioned above could therefore lead to suspension or expulsion. Further, every student punished or threatened with punishment would serve as a stark warning to other students against engaging in speech that the disciplinary authorities might view as "outrageous" and "distressing."

Students will quickly learn that arguments that some view as "outrageous" are too dangerous to make. Yet this is inconsistent with the First Amendment's protection of freedom in higher education. "To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation," because "[s]cholarship cannot flourish in an atmosphere of suspicion and distrust." *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957).

D. Restricting Some Speech on the Grounds That It Is "Outrageous" Leads to Pressure to Restrict Other Speech That Outrages Other People

Third, if some forms of speech were held to be constitutionally unprotected because of the outrageousness of their message, this would increase the pressure on universities to restrict other allegedly outrageous speech.

Say that some Muslim students, for instance, are outraged and severely distressed by publication of the Mohammed cartoons in a student group newspaper, or the display of such a cartoon in a flyer promoting a debate about the cartoons. Today, the university can justify its refusal to punish such a cartoon by pointing out that even outrageous ideas are constitutionally protected. And this recognition that all outrageous ideas are treated equally might make the Muslim students less offended. They might continue to be outraged by the cartoons, but they could make peace with the university's decision to tolerate the cartoons.

But if the Phelpsians' picketing were found to be so outrageous that it is stripped of First Amendment protection, the Muslim students would be more likely to demand that the same protection be extended to their feelings. And the university may therefore feel increasing pressure to restrict the publication of the cartoons as well. After all, allowing the cartoons would at that point be doubly outrageous to the students. First, it would be outrageous because of the content of the cartoons. And, second, allowing the cartoons would be outrageous because of the university's failure to give the students' feelings the same protection that the legal system would give Snyder's feelings.

E. Recognizing an "Intentional Infliction of Emotional Distress" Exception to the First Amendment May Pressure Universities to Restrict Allegedly Outrageous Speech, for Fear of Lawsuits by Offended Students and Employees

Likewise, say that today offended students, staff, or faculty threaten to sue a university on the grounds that the university's tolerance for student publication of the Mohammed cartoons creates a religiously hostile educational or work environment. Under current law, the university can be relatively confident that the lawsuit will be quickly dismissed *See, e.g.*, *Rodriguez v. Maricopa County Cmty. Coll. Dist.*, 605 F.3d 703 (9th Cir. 2010) (rejecting a hostile work environment harassment lawsuit brought by employees who were upset by racially offensive speech circulated by a faculty member). If the cartoons are constitutionally protected, then the university has neither the right nor the obligation to suppress them.

But say that the Phelpsians' picketing is stripped of First Amendment protection because it falls within a new exception for outrageous and severely distressing speech, and say that students or employees outraged by the Mohammed cartoons then threaten to sue if the cartoons are not suppressed. A university may well feel pressure to accommodate the demands, because it might worry that the cartoons would be found so "outrageous" that they are constitutionally unprotected. *See* 29 C.F.R. § 1604.11(e) (stating that an employer may be responsible on a workplace harassment theory even when the alleged harassment comes from "non-employees"—a category that would include students—when the employer learns of the alleged harassment "and fails to take immediate and appropriate corrective action"); *see also Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629 (1999) (holding that an educator may be liable if students are found to have created a hostile educational environment for other students); *id.* at 667 (Kennedy, J., dissenting) (noting that "[a] university's power to discipline its students for speech that may constitute sexual harassment is also circumscribed by the First Amendment," reasoning that would not apply to speech that falls within a First Amendment exception).

Moreover, hostile environment liability could yield a verdict in the hundreds of thousands of dollars (plus fees). A First Amendment lawsuit brought by a student whose constitutionally protected speech is erroneously punished would generally lead to an award of only nominal damages (plus fees). *See, e.g., DeJohn v. Temple Univ.*, 537 F.3d 301, 306 (3d Cir. 2008).

A university faced with a claim that the display of the cartoons is outrageous and so distressing that it creates a hostile work or educational environment—and is therefore constitutionally unprotected under some new First Amendment exception for outrageous speech—may therefore be likely to err on the side of caution and punish the speech. And that is true even if the university believes that, in the event the student speaker goes to court to challenge the discipline, the speech might well not be found outrageous (under the subjective and unpredictable outrageousness test) and therefore would be held to be constitutionally protected. *Compare, e.g., Henderson v. City of Murfreesboro*, 960 F. Supp. 1292

(M D. Tenn. 1997) (holding unconstitutional a city's application of a sexual harassment policy to remove from a designated public forum an impressionist painting depicting a nude woman), *with* Sharon H. Fitzgerald, *Free Speech Wins,* TENN. TOWN & CITY, Apr. 14, 1997, at 1 (quoting the City Attorney responding to that decision, and defending the city's earlier actions by saying, "'Sexual harassment is a very dangerous area for any employer today. You really can't be too cautious[.]' . . . 'This judgment was for $1 and costs. A sexual harassment judgment usually has six zeros behind it. Quite frankly, I'm an advocate of the First Amendment, but a very conservative lawyer when it comes to giving advice.'").

F. The Chilling Effect of the "Outrageousness" Standard is Exacerbated by Its Inherent Vagueness

The risk that the "outrageousness" standard will deter student speech is further exacerbated by the standard's vagueness. "[W]here a vague statute 'abut[s] upon sensitive areas of basic First Amendment freedoms,' it 'operates to inhibit the exercise of [those] freedoms.' Uncertain meanings inevitably lead citizens to 'steer far wider of the unlawful zone' . . . than if the boundaries of the forbidden areas were clearly marked." *Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972) (footnotes omitted).

What is true as to vague statutes is equally true as to the vague outrageousness-based emotional distress tort, or vague outrageousness-based speech codes Many students will be reluctant to express certain views if they fear sanctions under an "outrageousness" test—even if it is possible that the university will ultimately find that the speech was not outrageous enough to be punishable. And that is especially so if certain student groups make a habit of filing complaints against those who express views that outrage them.

G. An "Outrageousness" Standard Makes It Likely That Speech Will Be Restricted Because of Its Viewpoint

Finally, as this Court explained well in *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988), any outrageousness standard is likely to end up being unacceptably viewpoint-based, as well as too broad:

> "Outrageousness" in the area of political and social discourse has an inherent subjectiveness about it which would allow a jury to impose liability on the basis of the jurors' tastes or views, or perhaps on the basis of their dislike of a particular expression. An "outrageousness" standard thus runs afoul of our longstanding refusal to allow damages to be awarded because the speech in question may have an adverse emotional impact on the audience.

Id. at 55

To be sure, some view the subjectivity of the "outrageousness" standard as a virtue: "The determination of when [funeral picketing] crosses the line into *outrageous* conduct is rightly left up to a jury that will apply its own notions of reasonableness to decide what conduct should rise to the level of liability." Chelsea Brown, Note, *Not Your Mother's Remedy: A Civil Action Response to the Westboro Baptist Church's Military Funeral Demonstrations*, 112 W. VA. L. REV. 207, 232 (2009). "Civil action judgments 'reflect social conventions and tend to reflect what the majority believes to be acceptable behavior.'" *Id.* at 232 n.144 (citation omitted). Likewise, university disciplinary committee judgments tend to reflect what administrators or students believe to be acceptable speech.

But this Court has long, and correctly, held that such vague speech restrictions are not permitted under the First Amendment:

> [I]f arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application.

Grayned, 408 U.S. at 108–09 (footnote omitted). Delegating such matters to university administrators or student conduct committee members is no better.

II. *Hustler v. Falwell* Should Be Applied Even to Speech About Private Figures, a Category That Includes Many of the People Whom University Students Might Have Reason to Criticize

The underlying rationale of *Hustler v. Falwell* applies to all speech on matters of public concern—whether the plaintiff is a public figure or a private figure, and whether the speech is about a public figure, a private figure, or no particular person at all. This is especially important on university campuses.

A. The Public/Private Figure Distinction Makes First Amendment Sense Only as to Constitutionally Unprotected False Statements of Fact

Speech about private figures is generally constitutionally protected. Libel law, in which the public figure/private figure distinction is legally relevant, is constitutional only because of this Court's judgment that "there is no constitutional value in false statements of fact," *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974), regardless of who the plaintiff might be. (When false statements are protected, they are protected only because of the danger that restricting some unintentional falsehoods might deter even true statements. *Id.* at 341.) The public/private figure distinction thus bears only on the degree of culpability required to allow compensatory damages for those constitutionally valueless false statements of fact. The distinction does not justify liability for statements that fall outside the valueless category of false statements of fact.

In fact, in the same passage where this Court said that false statements of fact have no constitutional value, the Court also concluded that "Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas." *Id* at 339–40. Even outrageous and rightly morally condemned ideas are thus constitutionally protected And that too is true regardless of who is mentioned in the exposition of the idea. Private figure complainants in university disciplinary proceedings should be unable to suppress outrageous ideas, just as under *Hustler* public figures are unable to do so.

B. Much Speech on Matters of Public Concern on University Campuses Relates to Private Figures

Protecting even allegedly outrageous ideas about private figures is especially necessary because the category of private figures includes many people—civil rights lawyers, authors, civic group officers, professors, criminals, and more—who are involved with matters of public concern. And that is especially true at universities, where many important debates may refer to people who are not public figures under this Court's libel precedents.

For instance, a lawyer who had "long been active in community and professional affairs," "served as an officer of local civic groups and of various professional organizations," and "published several books and articles on legal subjects," was held to be a private figure, even with regard to a politically charged civil rights lawsuit in which he represented the plaintiffs. *Gertz*, 418 U.S. at 339–40. Likewise, a student group activist would likely qualify as a private figure. If *Hustler* were limited to public figures, a university would thus be free to punish supposedly outrageous and emotionally distressing speech that criticizes such activists. *See* John Schwartz, *Some On-Line Guidelines Are Out of Line With Free Speech Rights*, WASH. POST, Oct. 3, 1994, at F25 (discussing the U.S. Department of Education Office for Civil Rights investigation of a community college that declined to suppress speech harshly critical of a controversial student activist, and the Department's pressuring the college into paying a $45,000 settlement to the activist and two other students, and instituting an online speech code that would punish future instances of such speech); Letter from John E.

Palomino, Regional Civil Rights Director of the United States Department of Education Office for Civil Rights, to Dr. Robert F. Agrella, President of Santa Rosa Junior College, in case no. 09-93-2202 (June 23, 1994), *available at* http://www.law.ucla edu/volokh/harass/santarosa pdf at PDF pp 5–6, 14–15 (setting forth the Office for Civil Rights' position, and noting that the offending speech harshly criticized complainant LA because LA had organized a boycott of the student newspaper for running an ad with "a picture of the rear end of a woman in a bikini").

A director of research at a state mental hospital who was an adjunct university professor was also held to be a private figure, even with regard to a controversy stemming directly from his research. *Hutchinson v. Proxmire*, 443 U S. 111, 114–17 (1979). If *Hustler* were limited to public figures, a university would be free to punish a student journalist or blogger who ridicules an allegedly foolish, rude, or narrow-minded professor or administrator, or who argues that a noncitizen should be removed from some university position because that position should be limited to citizens, *see Dominguez v. Stone*, 638 P.2d 423 (N.M. Ct. App. 1981) (concluding that such speech about a city official may constitute intentional infliction of emotional distress).

This Court has also held that even a "person who engages in criminal conduct" may remain a private figure, even with regard to "issues relating to his conviction." *Wolston v. Reader's Digest Ass'n, Inc.*, 443 U.S. 157, 162–68 (1979). If *Hustler* were limited to public figures, a university would be free to punish a student who writes a newspaper article harshly condemning a student, faculty member, or staff member for committing a crime. (This is especially likely if the crime is likely to arouse sympathy among the students or administrators who make up the disciplinary committee—for instance, if the crime is illegal entry by an alien into the U.S., marijuana use, or criminal copyright infringement.)

We do not quarrel here with this Court's decisions limiting the public figure category, and allowing a wide range of people to recover compensatory damages for defamation based on a showing of the defendant's negligence in investigating the facts. Defamation claims involve constitutionally valueless false statements of fact that could wrongfully ruin someone's career or break up a family. But that such private figures may be protected against negligent falsehoods does not mean that they should be protected against supposedly outrageous expressions of opinion, especially on political, religious, or social matters.

III. Liability Based on the "Outrageousness" of Speech Is Impermissibly Content- and Viewpoint-Based

A content-neutral rule that restricts demonstrations in a narrow zone outside a funeral, whether the funeral is of a private figure or a public figure, might well be constitutional. The same would be true of similar content-neutral rules at a university, aimed at protecting the quiet of libraries, classrooms, memorial services, and the like. But this case does not involve a challenge to such a law; it involves an "outrageousness" standard that is neither content-neutral nor narrowly limited to funerals. *See Holder v. Humanitarian Law Project*, 2010 WL 2471055, at *19 (U.S. June 21, 2010) (concluding that even a law that is generally "directed at conduct, as the law in *Cohen* [*v California*] was directed at breaches of the peace" must be treated as content-based when "the conduct triggering coverage under the statute consists of communicating a message"); Eugene Volokh, *Speech as Conduct: Generally Applicable Laws, Illegal Courses of Conduct, "Situation-Altering Utterances," and the Uncharted Zones*, 90 CORNELL L. REV. 1277, 1286–1311 (2005) (arguing that harm-based laws such as the emotional distress tort must be understood as content-based when they are applied to speech because of the harm supposedly caused by its content).

Nothing in the emotional distress tort, or in the instructions such as the ones that the *Snyder* jury was given, constrains the decisionmaker to focus only on time, place, and manner, to the exclusion of viewpoint. *See* Jury Instructions, at 27, *Snyder v. Phelps*, No. 1:06-cv-01389-RDB, PACER docket entry 198 (D. Md. Nov. 2, 2007), *available at* http://www.law.ucla.edu/volokh/snyderjuryinstructions.pdf (Court's Instruction No. 21).[16] The jury may well have

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[16] The instruction does say, near the beginning, that "[t]he Defendants have the right under the First Amendment to engage in picketing, and to publish their religious message, no matter how much you may disagree with that message." *Id.* But it then goes on to say that "[s]peech that is "'vulgar', 'offensive', and 'shocking' . . . is not entitled to absolute constitutional protection under all circumstances.'" *Id.* Nothing in that sentence suggests that the offensiveness of speech, and its shocking nature, must be determined without regard to the viewpoint of the message.

Likewise, later in the instruction, the court says, "When speech gives rise to civil tort liability, the level of First Amendment protection varies depending on the nature and subject matter of the speech," and "you must then determine whether [defendants'] actions would be highly offensive to a reasonable person, whether they were extreme and outrageous and whether these actions were so offensive and shocking as to concluded that the outrageousness stems not just from the time and place of the speech, but also partly from the viewpoint: from the anti-American nature of the message, the approbation of the death of an American soldier, the message of hatred (not just moral disapproval) of gays, or the sacrilegious suggestion that God endorses the speakers' hatred.

If the picketing and online criticism had been triggered by the funeral of a recently killed enemy fighter—for instance, an American traitor who went to Iraq to kill other Americans but was brought back to America for burial—it is far from certain that the jury would have found the speech to be "outrageous." After all, the instructions' reference to "outrageousness" invited jurors to consider all the factors that can make speech outrageous, and to many people that may well include the viewpoint that the speech expresses. Likewise, a campus speech code written in terms of "outrageousness" would invite disciplinary committee members to consider whether a student's speech was expressing an outrageous viewpoint, and not just whether its time, place, or manner was outrageous.

Perhaps First Amendment specialists, steeped in the First Amendment insistence on viewpoint neutrality, might set aside the viewpoint of speech in deciding whether the speech is outrageous. Or perhaps even they would fall prey to the "inherent subjectiveness" of the outrageousness standard, and be tempted "to impose liability on the basis of [their]

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not be entitled to First Amendment protection" *Id.* at 27–28 Nothing in those phrases suggests that "the nature" of the speech, or whether it is "extreme and outrageous" or "offensive and shocking," must be determined without regard to the viewpoint that the speech expresses tastes or views, or perhaps on the basis of their dislike of a particular expression." *Hustler*, 485 U.S. at 55.

But in any event there is no reason to be confident that a lay juror, university administrator, or student disciplinary committee member will decide whether speech is outrageous without regard to the viewpoint of the speech. "If there is an internal tension between proscription and protection in the statute, we cannot assume that, in its subsequent enforcement, ambiguities will be resolved in favor of adequate protection of First Amendment rights." *NAACP v. Button*, 371 U S. 415, 438 (1963). Likewise, if a test's reference to "outrageousness" can be read as either authorizing the consideration of the viewpoint or as limiting the jury or a university disciplinary committee to other factors, there's no reason to assume that this ambiguity will be resolved in favor of viewpoint neutrality.

In fact, the states' *amici* brief in support of Snyder suggests that the result in this very case might have been different if the Phelpsians' ideas were different. "The Phelpses are not war protesters . . . . It is important for the Court to recognize and appreciate that the Phelpses' methods are unprecedented in American history; do not mistake them for Vietnam War protesters . . . ." Brief for the State of Kansas, 47 Other States, and the District of Columbia as *Amici Curiae* in Support of Petitioner at 6, *Snyder v. Phelps*, No. 09-751. The states' argument is apparently aimed at persuading this Court that the emotional distress tort can supposedly be limited to a narrow set of speakers. But in the process the argument simply highlights that any such narrowing would likely be achieved through viewpoint discrimination.

IV. Allowing the Suppression of "Outrageous" Speech in the Name of Protecting Its Targets' Religious Freedom Would Jeopardize Freedom of Debate at Universities

Petitioner argues that the verdict properly protects his own freedom to conduct a religious ritual—a funeral—without interference. But this argument is likewise unsound.

First, nothing in the emotional distress tort limits liability to such situations. Nothing in these jury instructions instructed the jurors to impose liability only if they found that the speech interfered with a religious ritual. And the picketing and the Web page in this case did not audibly or physically interrupt the funeral.

At most, the speech was implicitly critical of the religious service, and might have made the religious service less psychologically satisfying even for someone—like the petitioner—who first saw the picketing on television after the funeral. *Snyder v. Phelps*, 580 F.3d 206, 212 (4th Cir. 2009). That is hardly a legally cognizable interference with petitioner's religious practices.

Second, if the speech here were treated as a punishable interference with others' religious practices, then the threshold for such interference would have to be set so low that a wide range of other speech would likewise become restrictable. Publishing the Mohammed cartoons could lead to liability or university discipline on the theory that the cartoons interfere with Muslims' religious practices, because the memory of them disturbs Muslims' prayers at mosque or undermines the tranquility of Muslims' observance of their holy days. The same could be said of harsh condemnation or mockery of Christianity, or of Scientology.

Yet this is the sort of heated debate about ideas, including religious ideas, that often takes place at universities, as well as elsewhere. This Court's precedents rightly counsel against allowing government suppression of such debate. *See, e.g.*, *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952); *Kunz v. New York*, 340 U.S. 290 (1951); *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

V. Treating Petitioner as a "Captive Audience" to Respondents' Speech Would Jeopardize Freedom of Debate at Universities

Petitioner also argues that respondents' speech should lose First Amendment protection because he was a "captive audience" to such speech. This is so even though the respondents were picketing 1000 feet away from the funeral; petitioner saw the picket signs only on television, after the funeral; and much of the basis for the jury verdict consisted of speech on a Web site, to which no one can be captive.

And if the normal First Amendment constraints on vague, content-based, and potentially viewpoint-based speech restrictions are relaxed because petitioner was supposedly a "captive audience," then the same relaxation would affect speech on college campuses. College students confronted with speech on college campuses are generally considerably more "captive" than petitioner was, in the sense of being repeatedly and unavoidably confronted with the speech.

College students might see supposedly "outrageous" demonstrators, signs, or leaflets on their way to and from their classes, their homes in the dormitories, their on-campus jobs, or their on-campus religious services. They might see such speech several days in a row. And they would be unable to avoid seeing such speech unless they were willing to sacrifice their educational and professional opportunities, at considerable personal cost.

In fact, campus speech codes have often been justified on the grounds that students are a "captive audience" to offensive speech *See, e.g.*, Mari Matsuda, *Public Responses to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2372 (1989) ("Students are analogous to the captive audience that is afforded special first amendment consideration in other contexts."); Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431, 437 (1990) ("I also urge the regulation of racial epithets and vilification that do not involve face-to-face encounters—situations in which the victim is a captive audience and the injury is experienced by all members of a racial group who are forced to hear or see these words . . . ."). Yet despite such arguments, courts have routinely and correctly struck down speech restrictions imposed by public universities. *DeJohn v. Temple Univ.*, 537 F.3d 301 (3d Cir. 2008) (sexual harassment policy); *Dambrot v. Cent. Mich. Univ.*, 55 F.3d 1177 (6th Cir. 1995) ("discriminatory harassment" policy); *Iota Xi Chapter of Sigma Chi Fraternity v. George Mason Univ.*, 993 F.2d 386 (4th Cir. 1993) (overturning university sanctions against fraternity for allegedly creating hostile environment); *Smith v. Tarrant County Coll Dist.*, 694 F. Supp. 2d 610 (N.D. Tex. 2010) ("cosponsorship" policy); *Lopez v. Candaele*, No. CV 09-0995 (C.D Cal. Sept. 16, 2009), *available at* http://ia311029.us.archive.org/1/items/gov.uscourts.cacd.437120/gov.uscourts.cacd.437120.61.0.pdf, *appeal pending*, No. 09-56238 (9th Cir.) (sexual harassment policy); *Coll. Republicans at San Francisco State Univ. v. Reed*, 523 F. Supp. 2d 1005 (N.D Cal. 2007) (civility policy); *Roberts v. Haragan*, 346 F. Supp. 2d 853 (N.D. Tex. 2004) (free speech zone; sexual harassment policy); *Bair v. Shippensburg Univ.*, 280 F. Supp. 2d 357 (M.D. Pa 2003) ("racism and cultural diversity" policy); *Booher v. N. Ky. Univ. Bd. of Regents*, No. 2:96-CV-135, 1998 U.S. Dist. LEXIS 11404 (E.D. Ky. July 21, 1998) (sexual harassment policy); *UWM Post, Inc. v. Bd. of Regents*, 774 F. Supp. 1163 (E.D. Wis. 1991) ("discriminatory harassment" policy); *Doe v. Univ. of Mich.*, 721 F. Supp. 852 (E.D. Mich. 1989) ("discrimination and discriminatory harassment" policy); *Corry v. Leland Stanford Junior Univ.*, No. 740309 (Cal. Super. Ct. Feb. 27, 1995) ("harassment by personal vilification" policy). That many students might be unable to avoid speech that emotionally distresses them, or even outrages them, cannot justify content-based restrictions on such speech.

Or at least that is the rule today. It might no longer be the rule if the decision in this case upholds petitioner's radically broad view of when speech may be restricted to protect a "captive" audience. We urge the Court to avoid this grave threat to freedom of expression and debate, lest an exception for "outrageous and distressing" speech swallow the long-standing rule of free speech on our nation's campuses.

VI. The Court's Precedents Recognizing Constitutional Constraints on Tort Liability Are Consistent with the Original Meaning of the First and Fourteenth Amendments

The states' *amici* brief says that, "Until the Court's decision in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), the First Amendment generally placed no limits on state tort law." Brief for the State of Kansas, 47 Other States, and the District of Columbia as *Amici Curiae* in Support of Petitioner at 3, *Snyder v. Phelps*, No. 09-751. This is literally true as to the First Amendment, since by 1964 the Amendment had only been used to restrict state government action (via the Fourteenth Amendment) for a little over three decades, and the Court had not squarely dealt with First Amendment arguments for limiting state tort law. But the states' assertion could also be read as suggesting that until 1964 American law had generally refused to view constitutional free speech protections as applicable to tort lawsuits. And such a suggestion would be mistaken.

In fact, tort liability was at issue in the very earliest cases that protected speakers based on state constitutional analogs to the First Amendment: In 1802 and 1806, the Vermont Supreme Court and the South Carolina Constitutional Court of Appeals reversed libel verdicts for the plaintiffs, holding that the state equivalents of the Petition Clause barred recovery for alleged libels in petitions to the legislature. *Harris v. Huntington*, 2 Tyl. 129 (Vt. 1802); *Reid v. Delorme*, 4 S C.L. 76 (Const Ct. App. 1806). In 1818, the South Carolina Constitutional Court of Appeals applied the same reasoning as to the freedom of speech and press more broadly.

Mayrant v. Richardson, 10 S.C.L. 347 (Const. Ct. App. 1818).

In other early cases, courts acknowledged that the freedom of speech and press may apply to civil lawsuits as well as to criminal prosecutions, but reasoned that libelous speech was a constitutionally unprotected abuse of the freedom and could thus lead to civil liability as well as to criminal punishment *See, e.g.*, CONSTITUTIONAL DIARY (Philadelphia, Penn.), Dec. 14, 1799, at 3 (reporting on a jury instruction given by the Pennsylvania Supreme Court in *Rush v. Cobbett*); *Runkle v. Meyer*, 3 Yeates 518, 520 (Pa. 1803). Early commentators, including St. George Tucker, Chancellor Kent, and Justice Joseph Story, likewise treated civil liability the same as criminal punishment when it came to constitutional speech and press protections. JAMES SULLIVAN, A DISSERTATION UPON THE CONSTITUTIONAL FREEDOM OF THE PRESS IN THE UNITED STATES OF AMERICA 27–28 (1801); 2 ST. GEORGE TUCKER, BLACKSTONE'S COMMENTARIES: WITH NOTES OF REFERENCE, TO THE CONSTITUTION AND LAWS OF THE FEDERAL GOVERNMENT OF THE UNITED STATES, AND OF THE COMMONWEALTH OF VIRGINIA App. 29–30 (1803); 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW *18 (1827); JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION § 1882 (1833). The commentators concluded that libel was generally an exception to free speech protection, with regard to both civil liability and criminal punishment; but they did not deny that damages liability involved state action and was thus generally subject to constitutional constraints.

Some of the cases were brought by government officials; but they were suing as citizens defending their private rights, not as officials. And other cases were not brought by government officials. *See, e.g.*, *Mayrant*, 10 S.C.L. 347 (lawsuit brought by a candidate for office); *Runkle*, 3 Yeates 518 (lawsuit brought by a private party). The premise of the court decisions was that judicial action imposing liability for speech is covered by constitutional free speech provisions, regardless of whether the plaintiff himself was acting for the state. *See generally* Eugene Volokh, *Tort Liability and the Original Meaning of the Freedom of Speech, Press, and Petition*, 96 IOWA L. REV. (forthcoming 2010), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1626294 (discussing the subject in more detail and citing more sources).

These sources relied on state constitutional provisions, but this is because tort liability in the early Republic was almost entirely a matter of state law. And by the time the Fourteenth Amendment incorporated the First Amendment against state government action, the freedom of speech and press had been understood for decades as applying to civil tort liability as well as criminal punishment. *See, e.g.*, THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 422 (1868). The Court's conclusion in *New York Times Co. v. Sullivan*, 376 U.S. 254, 265 (1964), that "[i]t matters not that [a speech restriction] has been applied in a civil action and that it is common law only, though supplemented by statute[,]" is thus entirely consistent with American legal traditions from the Framing to the present.

CONCLUSION

Carving out an intentional infliction of emotional distress exception from the First Amendment, holding the Phelpsians liable because their speech interfered with the emotional value of petitioner's religious observance, or treating their speech as less protected because the petitioner was supposedly a "captive audience" would jeopardize more than just the Phelpsians' antics. It would also undermine the protections the First Amendment offers to university students, as well as to other Americans whose views might—rightly or wrongly—be seen as outrageous by government decisionmakers. For these reasons, the decision of the Fourth Circuit should be affirmed.

Respectfully submitted,

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In The

Supreme Court of the United States

◆

ALBERT SNYDER,

Petitioner,

v.

FRED W. PHELPS, SR. *et al.*,

Respondents.

◆

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

◆

BRIEF OF THE JOHN MARSHALL LAW SCHOOL VETERANS LEGAL SUPPORT CENTER & CLINIC AND THE CHICAGO SCHOOL OF PROFESSIONAL PSYCHOLOGY AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Does *Hustler Magazine, Inc., v. Falwell,* apply to a private person versus another private person concerning a private matter?
2. Does the First Amendment's freedom of speech tenet trump the First Amendment's freedom of religion and peaceful assembly?
3. Does an individual attending a family member's funeral constitute a captive audience who is entitled to state protection from unwanted communication?

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INTEREST OF *AMICI CURIAE*

Pursuant to Supreme Court Rule 37 the undersigned submit this brief as *amicus curiae* in support of Petitioner Albert Snyder (No. 09-751).[1] *Amici curiae* are attorneys from The John Marshall Law School Veterans Legal Support Center & Clinic and The Chicago School of Professional Psychology, who have extensive experience working with veterans, servicemembers and their families. *Amici* have an interest in presenting to the Court the history of military funerals and the psychological importance of these funerals for the families of servicemembers killed in action. To present the court with this research, *amici* have prepared a Brandeis Brief highlighting our key findings.

Established in 1899, The John Marshall Law School has upheld a tradition of diversity, innovation, access, and opportunity. Since its founding, John Marshall has set forth important principles of providing open legal education in an atmosphere free of discrimination. This dedication to equality and justice for all continues today with the Veterans Legal Support Center & Clinic.

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[1] All parties to this case have consented to the filing of this brief, and written indication of consent has been submitted. Pursuant to Supreme Court Rule 37.6, counsel for *amici curiae* certifies that this brief was not written in whole or in part by counsel for any party, and that no person or entity other than *amici curiae* or their counsel has made a monetary contribution to the preparation or submission of this brief.

In 2008, The John Marshall Law School opened the Veterans Legal Support Center & Clinic ("VLSC"), one of the first law school clinics in the nation dedicated to serving the needs of veterans. The VLSC was established by three law students, including a two-tour Operation Iraqi Freedom United States Marine. Although the initial focus of the VLSC was assisting veterans with appeals before the United States Department of Veterans Affairs, the VLSC has recognized the needs of Gold Star families, who have lost a loved one to war. The VLSC considers the protection of military funerals for servicemembers killed in action to be of vital importance, both historically and constitutionally. This position has been expressed since the Peloponnesian wars, is codified in Federal Regulations, and should be supported by the United States Supreme Court.

The Chicago School is the nation's oldest and largest graduate school focused exclusively on psychology and related behavioral sciences. The Chicago School is accredited by the Higher Learning Commission and an active member of the National Council of Schools and Programs of Professional Psychology, which has recognized The Chicago School for its distinguished service and outstanding contributions to cultural diversity and advocacy.

Dr. Paul Larson is a Clinical Professor of Psychology. Dr. Larson is the coordinator of the Health Psychology and Forensic Psychology concentrations at The Chicago School and works with both in-patient, residential, and out-patient veterans.

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SUMMARY OF ARGUMENT

Throughout history civilizations have placed reverent significance on the recovery and burial of their soldiers killed in a war zone. In the United States, traditions dating back to the Civil War frame the solemnization and meaning of the military funeral that is today governed by statute. This important ceremony both honors the ultimate sacrifice of the deceased and functions as the apex of the grieving process for the mourning family. Military funerals provide closure and comfort to families dealing oftentimes with the untimely and violent deaths of loved ones. The grief is simply immeasurable.

The interruption of these solemn and significant ceremonies has noteworthy psychological consequences that can negatively impact the family's grieving process. In the present case, the Petitioner's immeasurable grief was compounded by the infliction of emotional distress and intrusion into familial privacy intentionally undertaken by the Respondents. The Petitioner, like all family members saddled with the testing burden of burying a loved one killed in combat, is left captive at the funeral with no avenue of escape from unwanted intrusion. Objectionable and offensive conduct intentionally directed at this captive audience at such a significant stage in the grieving process causes injury actionable under the law.

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ARGUMENT

I. FAMILY MEMBERS OF SERVICEMEMBERS KILLED IN ACTION CAN SEEK REDRESS AGAINST PROTESTERS INTENTIONALLY TARGETING THE MILITARY FUNERAL IN AN OFFENSIVE MANNER

The burial of a loved one is as central to the concept of family as is birth, education, and the care and support of family members.[2] There can be no higher duty of the state than to protect the privacy of familial seclusion at the time where the family gathers to return a loved one to the earth. The ceremonies of burial, interment, and entombment are deeply rooted in the human experience, from the most ancient civilizations to our modern society, as symbols of respect for life lost and reverence of a spiritual journey not yet complete. Yet these ceremonies not only honor the deceased; they also serve as the central grieving mechanism for the family members left behind. Military funerals are thus particularly important, as they often provide comfort and closure in the wake of sudden, tragic, or premature deaths, namely when the deceased is a servicemember killed in combat. The military funeral serves as the emblematic final valediction for a mournful family too often robbed of the chance to say goodbye.

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[2] *Cf.*, Meyer v. Nebraska, 262 U.S. 510 (1923) (right to raise and educate children); Pierce v. Society of Sisters, 268 U.S. 510 (1925) (same); Skinner v. Oklahoma, 316 U.S. 535 (1942) (right to procreate); Moore v. City of East Cleveland, 431 U.S. 494 (1977) (right of family members to live together and care for each other).

The right and responsibility to bury those killed in combat has been engrained in civilizations since the beginning of recorded history. Thucydides, the ancient Greek historian, provided future generations an indelible accounting of the Athenian custom of staging elaborate funerals for fallen soldiers during the Peloponnesian War (344-404 B.C.). These funerals served as a testament to the character of Athenian democracy as described by Pericles, the Athenian general, during his famous funeral oration.[3]

> And when this power of the city shall seem great to you, consider then that the same was purchased by valiant men, and by men that knew their duty, and by men that were sensible of dishonour when they were in fight, and by such men as, though they failed of their attempt, yet would not be wanting to the city with their virtue but made unto it a most honourable contribution. For having everyone given his body to the commonwealth, they receive in place thereof an

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[3] Thucydides, (Richard Crawley trans., Modern Library 1951) (411 B.C.E.).

> undecaying commendation and a most remarkable sepulchre not wherein they are buried so much as wherein their glory is laid up upon all occasions both of speech and action to be remembered forever.[4]

These themes of honor and respect are reflected in this Court's recent decision in *National Archives & Records Admin. v. Favish*.[5] Justice Kennedy, writing for the unanimous Court, stated that "[f]amily members have a personal stake in honoring and mourning their dead and objecting to unwanted exploitation that, by intruding upon their own grief, tends to degrade the rites and respect they seek to accord to the deceased person who was once their own."[6] The Favish Court unambiguously reinforced the personal privacy rights of surviving family members to be free of "public intrusions long deemed impermissible at common law and in our cultural traditions."[7] This Court found direction in the significance of burial traditions stemming throughout history as evidenced by the Court's citation to the ancient Greek story of the bereaved Antigone.[8]

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[4] *Id.* at 2.43.3-4.

[5] Nat'l Archives & Records Admin. v. Favish, 541 U.S. 157 (2004).

[6] *Id.* at 169.

[7] *Id.* at 167.

[8] *See id.* at 168 (describing the universal cultural significance funerals have occupied from the beginning of civilization). This Court further noted the significance of

(Continued on following page)

It is this right of privacy, possessed by the mourning and not the mourned, which the Respondents intrude upon with their targeted protests. Moreover, disturbance of this personal right at such an essential and singular event creates a captive audience in the family members present to mourn. The state has an undeniable interest in protecting the seclusion and tranquility of these ceremonies because the family is at their most vulnerable; more vulnerable, even, than the captive audience recognized in this Court's holding in *Frisby v. Schultz*.[9]

In *Frisby*, the constitutionality of a city ordinance banning all picketing "before or about" any residence was challenged on First Amendment grounds by a group of anti-abortion protestors with a history of picketing directly in front of the residences of abortion doctors.[10] Justice O'Connor, writing for the majority, framed the analysis by drawing a distinction between general protesting and protesting targeted at the household.[11] The categorization of the household picketing as targeted provided the foundation for the introduction of the captive

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Sophocles' story of Antigone as a representation of the widespread recognition of respect for the internment of one's relatives.

[9] 487 U.S. 474 (1988).

[10] *Id.* at 476.

[11] *Id.* at 486.

audience analysis and is best summarized in this Court's own language:

> [t]he type of picketers banned by the Brookfield ordinance generally do not seek to disseminate a message to the general public, but to intrude upon the targeted resident, and to do so in an especially offensive way. Moreover, even if some such picketers have a broader communicative purpose, their activity nonetheless inherently and offensively intrudes on residential privacy. The devastating effect of targeted picketing on the quiet enjoyment of the home is beyond doubt.[12]

Continuing, Justice O'Connor stressed that "[t]he First Amendment permits the government to prohibit offensive speech as intrusive when the captive audience cannot avoid the objectionable speech."[13] Thus, this Court found that an inhabitant of one's home is "figuratively, and perhaps literally, trapped within the home, and because of the unique and subtle impact of such picketing is left with no ready means of avoiding the unwanted speech."[14] The targeted picketing of a grieving family mourning a loved one lost on the battlefield is even more devastating and intrusive than the picketing in *Frisby*. In the home one is able to close the blinds and turn up the television; at a funeral there are no blinds to pull. The home remains a home long after the protestors have gone, whereas a funeral is the singular moment in place and time in which family members may say a final farewell.

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[12] *Id.*

[13] *Id.* at 487.

[14] *Id.* at 487.

Targeting the funeral ceremonies of a member of the United States Armed Forces killed in battle creates the same privacy infringements protected against by this Court when the protest is targeted directly at the home. The family present to mourn the sacrifice of their loved one is captive in so far as they have no measure by which to simply ignore or avoid the intrusive conduct. In the present case, the inflictions of emotional distress are obvious. The Snyder family, in order to fulfill their duty and desire to bury their dead, was forced to endure malicious and self-serving political picketing related to issues neither linked to nor relevant to the death of their son. Unlike this Court's holding in *Cohen v. California*, the Snyder family could not "effectively avoid further bombardment of their sensibilities simply by averting their eyes."[15] The funeral, the experience of which is central to a healthy grieving process, can only happen once. As such, the Snyder family was literally trapped within the confines of the funeral service; their only possible recourse in the face of protesting being to abandon the ceremony, thereby abandoning Matthew. The Respondents' intrusion into the Snyder's familial privacy severely and permanently interrupted the process of mourning, grieving, and healing. As Justice Douglas noted in his famous captive audience dissent in *Public Utilities Commission of District of Columbia v. Pollak*, "[o]nce privacy is invaded, privacy is gone."[16]

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[15] 403 U.S. 15, 21 (1971).

II. SINCE THE CIVIL WAR, THE UNITED STATES GOVERNMENT AND MILITARY HAVE DEVELOPED PROCEDURES AND PROTOCOL TO GOVERN THE RECOVERY, RETURN, AND BURIAL OF SOLDIERS KILLED IN ACTION THAT HAVE BECOME A PART OF OUR NATION'S CULTURE AND TRADITION

Nothing in the First or Fourteenth Amendment prohibits a state from protecting the funerals of active duty servicemembers and the sensitivity and well-being of military families. To provide such protection would merely continue a pattern of responsiveness that the United States government and military have demonstrated in response to, and out of respect for, the wishes and welfare of military families.

The complex and highly ritualized system that the United States Government provides for the recovery, return, and burial of fallen servicemembers has evolved over nearly 150 years, and it has done so because family members like Albert Snyder have demanded that this nation treat its soldiers with the care and respect they deserve, in life and in death. In fact, it was one such father, anguished by the loss of his son in Virginia in March 1863, whose efforts resulted in the establishment of the first comprehensive ambulance system in the Civil War.[17] Henry Bowditch, himself a physician, heard news of his son Nat's wounds and immediately boarded a train to Virginia from Boston; upon arrival, he discovered that Nat had lain unattended on the battlefield and subsequently died. After using personal resources to recover his son's body and provide his family the opportunity to say goodbye in a deeply personal and solemn funeral, Bowditch then channeled his grief so that he could, "[transform] Nat's suffering into the salvation of others."[18] In the fall of 1863 Bowditch published a pamphlet persuasively arguing the state's obligation to its soldiers: "If any government under heaven ought to be paternal, the United States authority, deriving, as it does, all its powers from the people, should surely be such, and should dispense that power, in full streams of benignant mercy upon its soldiers."[19] These arguments spurred the establishment of an ambulance system by the next year, and, in the words of historian Drew Faust,

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[16] 343 U.S. 451, 469 (1952).

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[17] DREW GILPIN FAUST, THIS REPUBLIC OF SUFFERING: DEATH AND THE AMERICAN CIVIL WAR 90 (Knopf 2008).

[18] *Id.* at 170.

[19] *Id.* at 90.

"articulated a logic of obligation that applied not just to the wounded but also to the dead."[20]

This "logic of obligation" represents a broader legacy of the Civil War; the war that transformed "these" united states into The United States did not do so just by uniting North and South, but by imbuing the federal government with new, defining powers and responsibilities – to the war-wounded, the war dead, and equally to their families. The testimony of expert witness Chaplain Challis reveals that two of the central elements of a modern military funeral – the firing of volleys and the playing of "Taps" – emerged during the Civil War as a means of honoring the dead in a theater where scarce resources and overwhelming casualties rendered impossible the ability to provide a proper burial, much less funeral, for each fallen soldier and his family.[21] These traditions are representative of a broad range of efforts undertaken to give meaning to the enormous loss of life in the Civil War – for the nation and individuals alike – but they also suggest a growing recognition of the simple axiom that if a man dies in service of the state, the state then has a duty – logistical, financial, and even spiritual – to provide the fallen's family with a body and a burial; to, in

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[20] *Id.*

[21] Callis Test. 501:22-505:11.

Chaplain Callis's words, "honor the deceased and also bring comfort to the living."[22]

In the 1860s, after finally prevailing over Lee's army, the Union undertook an enormous effort to exhume bodies from battlefields and mass graves and rebury them, with ceremony, in a new network of national cemeteries:

> The engagement of the Union government in these matters, first made highly visible in the Gettysburg dedication ceremonies, acknowledged a new public importance for the dead. No longer simply the responsibility of their families, they, and their loss, now belonged to the nation. These men had given their lives that the nation might live; their bodies, repositories of their "selfhood" and "surviving identity," as Harper's had put it, deserved the nation's recognition and care. The dead, as well as the living, had claims upon a government "deriving," as Henry Bowditch proclaimed in his plea for ambulances, "all its powers from the people."[23]

The government did not take this new responsibility lightly. As Michael Sledge points out, "the amount of dirt excavated to bury, often several times, the dead from the Civil War forward has been enough to fill the Great Pyramid of Cheops almost three times over. This figure is even more significant when it is realized that not only was three pyramids' worth of dirt dug out of graves, the same amount had to be put back in."[24] The enormous scope of this project reflects how highly the survivors of war had come to value the proper treatment of war dead, as well as the opportunity a respectful reburial could offer families devastated by loss.

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[22] *Id.* at 507:24, 25.

[23] *See* Faust, *supra* note 17 at 101.

Since the Civil War, the practices and procedures surrounding the recovery, return and permanent burial of fallen servicemembers have evolved and adjusted to meet the practical limitations – financial, technological, and psychological – of different theaters of war. These procedures, as they have become institutionalized over the last 150 years, reflect a strong national consensus that the way we treat those who die in service to our nation matters deeply. The fact that this nation supports a policy of combat recovery, which entails endangering the lives of living soldiers in order to recover the bodies of the soldier dead, is a simple and profound statement of the value that is placed on the opportunity for fellow soldiers, families, and loved ones to say thank you and to say goodbye.[25]

A detailed account of the evolution of these recovery procedures is beyond the scope of this brief, but current military practice, wherein the recovery of remains of all armed service branches is the primary responsibility of the Army's U.S. Quartermaster Corps, trained in Mortuary Affairs and stationed at Fort Lee, Virginia, employs the most advanced and enlightened set of practices to emerge since the Civil War.[26] More relevant to this case is the highly ritualized military funeral that has evolved alongside recovery practices.

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[24] MICHAEL SLEDGE, SOLDIER DEAD: HOW WE RECOVER, IDENTIFY, BURY & HONOR OUR MILITARY FALLEN 223 (Columbia University Press 2005).

[25] *See id.* at 44-61.

Today, the military provides specialized funerals for its fallen active duty servicemembers and veterans. These unique funerals serve many purposes. The obvious goal is to honor the fallen servicemember. To do this appropriately, Congress and the Department of Defense ("DoD") have created special rules and procedures for military funerals, making them unique in both custom and symbolism.[27] While these rules were recently codified in legislation and DoD policies, they are the result of long-standing traditions rooted in both United States and international custom. Adhering to these traditions and guidelines creates the necessary uniformity in military funerals, performed either on Government property or in a public space, vital to ensuring a proper burial for the fallen servicemember.[28] More importantly, "[r]endering military funeral honors reflects the high regard and respect accorded to Military Service and demonstrates military professionalism to the Nation and the world."[29]

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[26] *See id.* at 32-44.

[27] Department of Defense Instruction 1300.15 (Oct. 22, 2007); Armed Forces – Funeral Honors Functions at Funerals for Veterans, 10 U.S.C. § 1491 (2009).

Military honors, as used today, were first recognized by Congress in the National Defense Act of 2000.[30] However, the formal elements of an honors detail date back to the 18th century in the United States, and earlier in Europe. A funeral honors detail performs many important functions at a servicemember's funeral, some required by statute, others by tradition. Section 1491 requires, at a minimum, folding of the National flag, the presentation of the flag to the next of kin, and the playing of "Taps."[31]

To properly perform these tasks, strict procedure must be followed. For example, "when the flag is used to cover a casket, it should be so placed that the union is at the head and over the left shoulder. The flag should not be lowered into the grave or allowed to touch the ground."[32] When presented to the next of kin, the issuing marine states: "On behalf of the

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[28] Department of Defense Instruction 1300.15, § 4.1 (Oct. 22, 2007).

[29] 10 U.S.C. § 1491(c) (2009).

[30] National Defense Authorization Act of 2000, Pub. L. No. 106-65, § 578, 113 Stat. 512, 625-31 (2000) (codified as amended at 10 U.S.C. § 1491 (2009)).

[31] 10 U.S.C. § 1491(c) (2009).

[32] United States Flag Code, 4 U.S.C. § 7(n) (2008).

President of the United States, the Commandant of the Marine Corps, and a grateful nation, please accept this flag as a symbol of our appreciation for your loved one's service to Country and Corps."[33] Additionally, "Taps," unique to the United States military, may only be performed by an official military bugler, or if none is available, through a recording with adequate sound amplification.[34]

To supplement Section 1491, the military follows time-honored European traditions dating back to the 18th century. The three-rifle volley, performed over the casket of the fallen, has the most striking beginnings. Historically, gun salutes were a sign of respect and trust. Viewed today "as a great honor,"[35] the rifle volley stems from the European dynastic wars, commonly referred to as the French and Indian Wars, where both sides would cease fighting to clear the battlefield of the dead. A three-rifle volley was then used to signal that the field was cleared and fighting could resume.[36] It is apparent, even amidst battle, that the fallen were afforded the utmost dignity and respect. Today, the three-rifle volley is performed by seven servicemembers each firing in unison.[37]

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[33] Military Salute Project, United States Flag Manual 28 (2008), http://militarysalute.proboards.com/index.cgi?board=flag&action=display&thread=737 (follow "*View or download in Adobe PDF format for printing on one side of a page . . .* " hyperlink).

[34] 10 U.S.C. § 1491(c) (2009).

[35] UNITED STATES DEPARTMENT OF VETERANS AFFAIRS, CELEBRATING AMERICA'S FREEDOMS – GUN SALUTES 1, http://www1.va.gov/opa/publications/celebrate/gunsalute.pdf.

[36] *Id.*

Despite customs and statutes, the United States has always provided the family of the fallen servicemember control over how the funeral is performed.[38] This recognition and respect for the family is a reflection of the Government's strong interest in honoring both the fallen and their families. Furthermore, traditions such as the three-rifle volley, the playing of "Taps," and the use of active military personnel as pallbearers, brings order, discipline, and meaning to the grieving family in a time of despair.

In Matthew Snyder's case, the Snyder family chose to have Marine pallbearers, the American flag over the casket, a three-rifle volley, and the playing of "Taps."[39] Setting the scene of the funeral, Albert Snyder testified that while his son was being carried to his grave for the last time, he stood and saluted.[40] Had Matthew's funeral not adhered to military regulation, Mr. Snyder would not have had the chance to give his son the final salute he deserved.

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[37] Military Funeral Customs, http://www.arlingtoncemetery.net/customs/htm.

[38] Department of Defense Instruction 1300.15, § 4.5 (Oct. 22, 2007).

[39] Albert Snyder Test. 189:15, 199:5, 6, 9.

[40] *Id.* at line 14.

More importantly, allowing protestors at military funerals will deny future Gold Star families this solemn opportunity.[41]

The dominant theme in the evolution of the United States military's recovery, return and burial practices is the growing recognition, through experience and education, that the treatment of combat casualties is vital to an effective military. Sometimes, it takes a victim of such a casualty – a father or family member such as Henry Bowditch or Albert Snyder, or those who "undertake the work not just of burial but also of consolation and mourning,"[42] – to remind the government of its right and responsibility to ensure that all servicemembers and families who sacrifice on its behalf receive, or are able to bid, a peaceful and solemn goodbye. This right and responsibility strongly supports a finding by this Court that there is a compelling government interest in protecting military funerals from protest.

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[41] Gold Star Family is one who is entitled to a gold star lapel issued by the Military. This lapel identifies widows, parents and next of kin of members of the Armed Forces of the United States who lost their lives. 10 U.S.C. § 1126 (2009).

[42] *See* Faust, *supra* note 17 at 143.

III. FAILURE TO PROTECT THE PRIVACY INTERESTS OF MILITARY FAMILIES CAN SEVERELY DISRUPT AND EXACERBATE THE GRIEVING PROCESS

Military funerals serve to honor the life and sacrifice of a fallen servicemember, while also providing a private and solemn ceremony for the surviving family. Funerals concerning a sudden death, like Matthew Snyder's, have greater significance because there is no time to say goodbye.[43] The military funeral provides this chance. At a time when the grieving family gathers to mourn and come to terms with a loved one's death, the targeted disruption of a military funeral can act to aggravate the emotional trauma of the deceased's family and desecrate the identity of the soldier killed in combat.

A. The Circumstances Surrounding a Servicemember's Deployment and Combat Related Death are Unique

Military personnel have the uniquely honorable, yet emotionally tolling, responsibility of serving the country during times of both peace and war. Decades of research show that deployments undoubtedly take an emotional and psychological toll on servicemembers.[44] Often overlooked is the extreme emotional

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[43] Vol. XI at 2730.

[44] R.A. Kulka, et al., *Trauma and the Vietnam War Generation: Report of Findings from the National Vietnam*

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hardship faced by the families of the deployed. Though the patriotism and confidence of the American people provides support to those deployed, it does very little, if anything, for the immense stress and personal angst felt by the families left behind. Families are forced to endure goodbyes with their loved ones, fully immersed in the knowledge that this may be the final goodbye. This fear and uncertainty is transformed into shock and grief when there is a knock at the door with the message that their loved one has been killed.

Unlike civilian deaths, military deaths are almost always the result of unspeakably violent events.[45] This reality is difficult for both the servicemembers who face it every day, and their loved ones left to deal with the aftermath. The fact that a loved one is deceased is difficult to comprehend in and of itself, but when this is coupled with the knowledge that the death was painful and violent, the survivors often suffer additional emotional harm.[46]

Veterans Readjustment Study (1990); Anthony Pappa, et al., Traumatic bereavement in war veterans. *Psychiatric Annals, 38*(10), at 687.

[45] Kathleen M. Wright, et al., *Military spouses: Coping with the fear and the reality of servicemember injury and death.* In Military Life: The psychology of servicing in peace and war, Vol. 3, The military family, Carl A. Castro, et al., eds., 2006.

[46] *Id.*

B. The Grieving Process Related to the Death of a Servicemember is Distinct from Other Deaths

The uncertain finality of the goodbye, the horrendous nature of the death, the unwanted attention the family receives from third parties, and the tremendous upheaval that a military family experiences creates trauma that can have long-lasting impacts on an individual's ability to properly grieve.[47] Psychologists have long recognized five basic stages of grieving: (1) denial, (2) anger, (3) bargaining, (4) depression, and (5) acceptance.[48] These stages do not necessarily occur in a linear manner, and this analysis is not fully representative of the complex grief experienced by military families.[49]

Research has shown that disruption of an individual's grieving process can result in more serious psychological consequences. Complicated grieving ("CG"), "which is also referred to as 'traumatic grief,' or 'prolonged grief disorder,' is associated with significant suffering, functional impairment, and morbidity, with indications that once individuals develop CG, they are at substantial risk for chronic problems that are resistant to treatment."[50] During the grieving process it is crucial for the bereaved to be free from harmful external intervening forces. When the grieving process is interrupted, or where the meaning of the death is insulted or reviled, the grief becomes more complicated as there is additional aggravation of emotional burdens.[51] When that interruption is intended to "place a little bug" in the head of a grieving family member, such interruption is tantamount to "pouring salt into the wound."[52]

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[47] Jacqueline Melissa Swank & E.H. Mike Robinson, *Addressing Grief and Loss Issues With Children and Adolescents of Military Families*, paper based on program presented at the American Counseling Association Annual Conference and Exposition, Charlotte, NC (March 19-23, 2009), *available at* www.counselingoutfitters.com/vistas/vistas09/Swank-Robinson.doc.

[48] ELIZABETH KÜBLER-ROSS & DAVID KESSLER, ON GRIEF AND GRIEVING: FINDING THE MEANING OF GRIEF THROUGH THE FIVE STAGES OF LOSS (Scribner ed., Simon & Schuster 2005) (1969).

[49] *See* Swank, *supra* note 28.

In addition to the cause of death, other external factors contribute to the grief associated with the death of servicemembers killed in action. The Respondents' expert explained the consequences of the Phelpses' action with regard to Mr. Snyder's depression: "[I]t interfered with the process that we go through of honoring our soldiers who die for their country and also could have surely interfered with the grieving process and allowing him to be a hero without any tarnish on his casket."[53]

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[50] *See* Pappa, *supra* note 42.

[51] *Id.*

[52] Vol. VIII at 2111-2112, 2206, and 2237.

[53] Vol. X at 2578.

C. Protests at a Military Funeral Have Injurious Effects on the Grieving Process

The funeral affords the grieving family an opportunity to preserve the fallen hero's social identity beyond death. Every person has two identities when alive, a social self and a physical self, both controlled by the individual.[54] The physical self is the corporeal aspects of a person – how tall they are, how much they weigh, and their style of dress.[55] On the other hand, the social self is how one acts in society – whether they are a charitable person, adventurous, or introvert.[56] During one's life, these two identities travel on identical paths.[57] However, at death, these two identities move in opposite directions. While one's physical self begins to deteriorate through the normal decomposition process, the social self, or social identity, continues to evolve.[58] This new social identity is how the deceased will be remembered forever.

For obvious reasons, the deceased can no longer control their social identity. Rather, the surviving family and friends have the responsibility of creating a new social identity for the deceased – an identity that will continue beyond death.[59] Pericles explained this great responsibility at a funeral during the Peloponnesian War:

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[54] SLEDGE, *supra* note 24 at 23.

[55] *Id.*

[56] *Id.*

[57] *Id.* at 22.

[58] *Id.*

> Turning to the sons or brothers of the dead, I see an arduous struggle before you. When a man is gone, all are wont to praise him, and should your merit be ever so transcendent, you will find it difficult not merely to overtake, but to even approach their renown.[60]

Creating a new social identity serves two purposes: providing closure for the family and honoring and preserving the positive memory of the deceased.[61] During the family's process of creating an identity for the deceased, the bereaved work through their grief and attempt to give meaning to the death.[62] The funeral ceremony is the first chance the family has to establish the new identity. While creating a new identity, the family of the bereaved honors the dead and preserves the positive memories of the deceased's life.[63] When this new social identity is contradicted or questioned, the deceased's legacy tarnishes in a way inconsistent with the family's wishes. In Matthew Snyder's case, his family wanted him to be remembered as a loving son and a hero who died for his

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[59] *Id.* at 23.

[60] *Id.*

[61] *Id.* at 22.

[62] *Id.*

[63] *Id.*

Country as a United States Marine. Unfortunately, the Respondents created a different identity – one by which Matthew will be infinitely remembered. To the media and the world, Matthew Snyder will forever be remembered for signs that read "God Hates Fags," and "Thank God for Dead Soldiers."[64]

The military funeral is much more than mere show; it is a means to honor and recognize the fallen's sacrifice. This ceremony, with the draped flag and its subsequent folding, the playing of "Taps," the three-rifle volley, and the honor guard, are all ways of recognizing what the individual sacrificed in service for his Country. To have that meaning shattered by protestors creates additional trauma for the family. It is the necessity for outward recognition of the worthiness of the sacrifice that makes military funerals, like those of fallen police or fire personnel, so unique and encouraging for a new generation to follow in their brave footsteps.[65]

◆

CONCLUSION

The family members present at the funeral of a soldier killed in service to their Country are truly a captive audience. To suggest that a grieving family could turn away from the protestors and ignore their visible presence is to deny the emotional and psychological significance of the burial ceremony. The important position the military funeral occupies in the grieving process is severely undermined when disturbed by malicious targeted protesting. A disturbance in this formal procedure, recognized throughout history as a way to provide comfort and closure to the bereaved family, can lead to the formation or exacerbation of considerable psychological dysfunction and even act to lengthen the mourning period.

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[64] Vol. VIII at 2119, 2121.

[65] Mary Beth Williams, Impact of Duty-Related Death on Officer's Children: Concepts of Death, Trauma Reactions and Treatment, *in* Police Trauma: Psychological Aftermath of Civilian Combat. (J. M. Violanti & D. Paton eds., 1999).

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AMICUS CURIAE BRIEF

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In the
Supreme Court of the United States

ALBERT SNYDER,

Petitioner,

v.

FRED W. PHELPS, SR., ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR THE STATE OF KANSAS, 47 OTHER STATES, AND THE DISTRICT OF COLUMBIA AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

May the States protect the privacy and emotional health of grieving families from the psychological terrorism of persons who target such families with hostile picketing at funerals and internet postings that include personal attacks on the families and their deceased children?

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INTEREST OF THE *AMICI* STATES

The States have a compelling interest in protecting the sanctity and privacy of funerals, both to honor deceased citizens and to support and comfort grieving families. Honoring the dead is a tradition that stretches back for centuries of human history, one shared across diverse cultures and national borders. The dignity and sanctity of burial rites far predates the U.S. Constitution, and gives the States two strong legal interests in the questions presented in this case.

First, in recognition of the ancient cultural and common law traditions of honoring the dead and protecting the privacy of mourners, more than 40 States have enacted "funeral picketing" or "funeral protest" time, place and manner statutes that regulate protests around funerals.[1] **Second**, the States long have protected the emotional well-being of grieving families through traditional tort law, which is first and foremost a creature of state law, not federal law. For 100 years or more, the States have imposed tort liability for inflicting emotional harm on the families of the deceased. The States' tort law will not turn a blind eye to psychological terrorism that targets grieving families.

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[1] *See* Ala. Code § 13A-11-17; Ark. Code. Ann. § 5-71-230; Cal. Penal Code § 594.353; Colo. Rev. Stat.§ 18-9-125; Conn. Gen. Stat. § 53a-183c; Del. Code. Ann. tit. 11, § 1303; Fla. Stat. § 871.01; Ga. Code. Ann. § 16-11-34.2; Idaho Code Ann. § 18-6409; 720 Ill. Comp. Stat. 5/26-6; Ind. Code § 35-45-1-3; Iowa Code § 723.5; Kan. Stat. Ann. § 21-4015a; Ky. Rev. Stat. Ann. §§525.145, 525.155; La. Rev. Stat. Ann. § 14:103; Me. Rev. Stat. Ann. tit. 17, § 501-A; Md. Code Ann., Criminal § 10-205; Mass. Gen. Laws Ann. ch. 272, § 42A; Mich. Comp. Laws § 750.167d; Minn. Stat. § 609.501; Miss. Code. Ann. § 97-35-18; Mo. Rev. Stat. § 578.501; Mont. Code Ann. § 45-8-116; Neb. Rev. Stat. §§ 28-1320.01 to 28-1320.03; N.H. Rev. Stat. Ann. § 644:2-b; N.J. Stat. Ann. § 2C:33-8.1; N.M. Stat. §§ 30-20B-1 to 30-20B-5; N.Y. Penal Law § 240.21; N.C. Gen. Stat. § 14-288.4(a)(8); N.D. Cent. Code § 12.1-31-01.1; Ohio Rev. Code Ann. § 3767.30; Okla. Stat. tit. 21, § 1380; 18 Pa. Cons. Stat. Ann. § 7517; R.I. Gen. Laws § 11-11-1; S.D. Codified Laws §§ 22-13-17 to 22-13-20; Tenn. Code Ann. § 39-17-317; Tex. Penal Code Ann.

SUMMARY OF THE ARGUMENT

State laws protecting the sanctity of funerals, such as the States' "funeral picketing/protest" laws, are constitutional for at least three reasons. **First**, the privacy interests inherent in funeral proceedings are at least as strong as the compelling privacy interests in the home which the Court explicitly recognized in *Frisby v. Schultz*, 487 U.S. 474 (1988); accordingly, funerals should be afforded at least as much protection. **Second**, those attending funerals are a "captive audience" for First Amendment purposes. Parents, siblings, family, close friends, and neighbors cannot be expected to skip a loved one's funeral in order to avoid the malicious and intentionally hurtful messages the Respondents (Phelpses) love to use to target mourners. **Third**, this Court, as well as many lower courts, has recognized that targeted picketing—the Phelpses' primary means of terrorizing mourners at a funeral—is a particularly intrusive and harassing form of speech.

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§ 42.055; Utah Code Ann. § 76-9-108; Vt. Stat. Ann. tit. 13, § 3771; Va. Code Ann. § 18.2-415; Wash. Rev. Code Ann. § 9A.84.030; Wis. Stat. § 947.011; Wyo. Stat. Ann. § 6-6-105.

State tort law that protects the privacy and emotional health of grieving families is also constitutional for at least three reasons. **First,** the common law long has provided protection for private citizens in cases involving harmful speech. Until the Court's decision in *New York Times v. Sullivan*, 376 U.S. 254 (1964), the First Amendment generally placed no limits on state tort law, and the actual malice rule of *New York Times* has no place outside of defamation claims brought by public officials and public figures against media defendants in situations involving matters of legitimate public concern. The targets of the picketing and internet postings in this case are not the general public but, rather, a deceased soldier and his private citizen father mourning the loss of his son in private. This is not a defamation case, does not involve media defendants, and there are no public officials or public figures here.

Second, the Phelpses' outrageous personal attacks on Matthew Snyder and his family did not involve a matter of public concern. The Snyders as private citizens had no connection to the Phelpses' world views, and thus the Snyders' grief was not itself a matter of public concern. If the test is simply that any citizen may be attacked viciously and personally so long as the speaker addresses a matter involving a class of which such private citizens are members, then there is no longer any constitutional distinction between matters of public and private concern. A war is a matter of public concern, but that does not give the Phelpses a license to attack personally *every soldier* and *every soldier's family*, any more than publicized troubles of the Catholic Church give the Phelpses a license to target and personally attack any private citizen who happens to be Catholic.

Third, the tort of intentional infliction of emotional distress ("IIED")[2] imposes such a high bar for recovery that any federal constitutional concerns are satisfied by proving a prima facie case of IIED. In particular, IIED requires proof of (1) intentional or reckless conduct, (2) that is extreme and outrageous, and (3) that causes severe emotional distress in the plaintiff. The first element imposes the same high standard (intent or recklessness) that the Court adopted in the *New York Times* actual malice rule. Although state tort cases applying the "extreme and outrageous" conduct element often have involved speech or expressive conduct, the state courts have been extremely stingy in finding that conduct rises to the level required; mere insults or annoying behavior will not satisfy this element. Finally, because the tort of IIED requires proof that the defendants have caused *severe* emotional distress, there is no risk of imposing liability when citizens are simply offended or irritated, even assuming the conduct is intentional and outrageous. The harm caused must be both *intended* and *severe*.

Condemning the Phelpses' conduct here will not open the door to wide-ranging tort liability, because *no one else in the history of this country* has utilized their tactics. No one else has engaged in the targeted picketing of funerals to attack deceased soldiers (and others) and their grieving families, or used internet postings to terrorize the grieving. No one has engaged in copycat picketing since the Phelpses began their attacks, in spite of the obvious publicity and notoriety the Phelpses' tactics have gained them. *No one*. Thus, no traditional, necessary or even marginally valuable method of protest will be lost by holding the Phelpses accountable for their emotional terrorism.

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[2] The jury also imposed liability for the tort usually referred to as "intrusion upon seclusion". Although liability under that tort also may be appropriate here, the States focus on the tort of intentional infliction of emotional distress because it provides the narrowest basis for upholding tort liability in this case.

The IIED tort is appropriate in the circumstances presented here, and for decades the state courts have applied and developed this tort in situations involving abusive speech, holding plaintiffs to compelling proof in order to recover. Indeed, this Court should hold that requiring proof of the elements of the tort of IIED is the full extent of the legal protection to which the Phelpses are entitled. Immunizing the Phelpses in the name of the First Amendment is an unwarranted interference with decades of state tort jurisprudence, is legally unnecessary to protect public debate on matters of public concern, and is not supported by a careful reading of this Court's defamation-oriented First Amendment precedents.

ARGUMENT

I. Funerals Represent A Special Circumstance Warranting State Protection.

Introduction

This case involves the Phelpses' targeted picketing of a particular private family, the Snyders, in a venue that both by human tradition and common law is considered sacred and unique: a private funeral service. The targets of the Phelpses' conduct, a soldier killed in the line of duty in Iraq and his grieving father, are not public officials or public figures. They are simply private Americans, one who made the ultimate sacrifice for his country, and the other who is mourning that sacrifice and the loss of his son. The Phelpses' targeting of the Snyders ensured that the son could not be laid to rest in peace with the full dignity and respect he deserved, and that his father could not grieve in peace with the sanctity and privacy he deserved.

The Phelpses are not war protesters; they are zealots who target private citizens for harassment and psychological attack, exploiting those citizens' private grief and unbearable suffering to gain public attention and notoriety for the Phelpses' causes.[3] It is important for the Court to recognize and appreciate that the Phelpses' methods are unprecedented in American history; do not mistake them for Vietnam War protesters, Jehovah's Witnesses, or Hare Krishnas. Indeed, to compare the Phelpses to any other protesters or religious groups in the Court's past cases is to insult and demean such groups.

First Amendment freedom of speech is not absolute. Fundamentally, this case boils down to whether the States may protect the privacy and emotional health of grieving families from the targeted harassment in which the Phelpses engage. No one questions that the Phelpses are "speaking" when they picket private funerals. But how are the values of the First Amendment and the interests of American society served by tolerating such tactics in the unique and sacred setting of funerals for private citizens?

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[3] The Phelpses even proposed to picket the funerals of five Amish girls killed by a crazed gunman, but apparently were persuaded to forego that endeavor by a radio talk show host who gave the Phelpses time on the air to espouse their views instead. *Air Time Instead of Funeral Protest*, New York Times, Oct. 6, 2006, A14.

The decision below must be reversed.

A. The Sanctity And Privacy Of Funerals Is Unique.

1. Centuries Of Human Tradition And Common Law Recognize That Funerals Are Unique And Sacred, A Recognition That Far Predates The U.S. Constitution.

Funerals are a special and truly unique circumstance for First Amendment analysis, with the closest and best analogy in this Court's decisions being the sanctity of the home. Funerals should receive at least as much protection from unwanted emotional terrorism as the Court has accorded private homes. The States should be accorded their traditionally recognized police powers to adopt and enforce reasonable time, place, and manner regulations on activities that may disrupt funerals, and to define civil tort liability for conduct that intentionally inflicts emotional distress and invades sacred privacy interests.

This Court already has recognized the unique and important nature of funerals, their special solemnity, and the substantial privacy rights that inhere in them. In *National Archives and Records Administration v. Favish*, 541 U.S. 157, 167-68 (2003) (internal citation omitted), the Court observed, "[b]urial rites or their counterparts have been respected in almost all civilizations from time immemorial. They are a sign of the respect a society shows for the deceased and for the surviving family members." The Phelpses, however, have chosen to desecrate these ancient rites, most recently at the funerals of America's fallen soldiers, and are intentionally inflicting emotional harm on grieving families that is in effect much like the "outrage at seeing the bodies of American soldiers mutilated and dragged through the streets." *Id.* at 168.

The Court emphasized in *Favish* that "[f]amily members have a personal stake in honoring and mourning their dead and objecting to unwarranted public exploitation that, by intruding upon their own grief, tends to degrade the rites and respect they seek to accord to the deceased person who was once their own." 541 U.S. at 168. Thus, the Court recognized a right to privacy inherent in funeral proceedings that has deep roots in the common law and human tradition:

> It is the right of privacy of the living which it is sought to enforce here. That right may in some cases be itself violated by improperly interfering with the character or memory of a deceased relative, but it is the right of the living, and not that of the dead, which is recognized. A privilege may be given the surviving relatives of a deceased person to protect his memory, but the privilege exists for the benefit of the living, to protect their feelings, and to prevent a violation of their own rights in the character and memory of the deceased.

Id. (quoting *Schuyler v. Curtis*, 147 N.Y. 434, 447, 42 N.E. 22, 25 (1895)).[4]

It is this solemn right of privacy in one of the most sacred traditions of human civilization that the Phelpses have attacked, denigrated, and violated. The Snyder family had but one opportunity to honor and mourn their fallen son, one opportunity to pay their final respects, one opportunity to bury him with solemn dignity in a time-honored tradition that far predates the founding of our country and the adoption of our Constitution. The Snyder family should have been guaranteed their time of mourning in peace, with privacy, tranquility, and dignity. Traditions as old as humanity,[5] much older than our Constitution, demand such privacy; the First Amendment does not abrogate all history and cultural norms to protect the Phelpses' unprecedented tactics.

2. No Court Has Ever Held That A Funeral Service Is A Public Forum, And Even Public Cemeteries Are Not Considered Public Fora For First Amendment Purposes.

Funeral services are not themselves traditional public fora in which the Phelpses could claim a First Amendment right to express their hateful messages. Not surprisingly, no court has ever held or suggested that a funeral service is a public forum for First Amendment purposes. Instead, courts across the country have ruled uniformly that even *public* cemeteries are not public fora for First Amendment purposes. *See, e.g., Warner v. City of Boca Raton*, 420 F.3d 1308 n.1 (11th Cir. 2005); *Griffin v. Sec'y of Veterans Affairs*, 288 F.3d 1309, 1322 (Fed. Cir. 2002); *Warren v. Fairfax County*, 196 F.3d 186, 201 (4th Cir. 1999); *Jackson v. City of Stone Mountain*, 232 F. Supp. 2d 1337, 1353 (N.D.Ga. 2002); *Lower v. Bd. of Dirs. of Haskell County Cemetery Dist.*, 56 P.3d 235, 244 (Kan. 2002). Thus, any claim by the Phelpses that they have a First Amendment right to intrude upon a funeral service is a nonstarter.

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[4] Compare *McQueary v. Stumbo*, 453 F. Supp. 2d 975, 992 (E.D. Ky. 2006), in which the Court put it this way: "A funeral is a deeply personal, emotional and solemn occasion."

[5] "The ritual burial of the dead" has been practiced "from the very dawn of human culture and . . . in most parts of the world." 26 Encyclopedia Britannica 851 (15th ed. 1985).

Although the Phelpses stood on public ground to conduct their targeted picketing, that has never been the sole or determinative inquiry for First Amendment purposes. Indeed, this Court's front steps and plaza are public property, but that does not mean the Phelpses could engage in targeted picketing of Justices or Court employees and their families in such places simply because the government owns the ground under the Phelpses' feet. *Cf. United States v. Grace*, 461 U.S. 171, 176-83 (1983) (striking down federal statute that barred protests on the public sidewalks along the street passing by the Court building, but carefully distinguishing those sidewalks from other areas open to the public, including the Court's plaza and front steps).

The Phelpses' avowedly intend to and succeed in delivering their targeted messages beyond public ground; indeed, their goal is to harass and target those attending private funeral services. Thus, the primary effect of their protest was to intrude upon the peace and tranquility of the Snyder family and other funeral attendees, all of whom were mourning on private ground. The Phelpses' target audience was the funeral service and those attending it; the Phelpses were not present to display signs to passing motorists or pedestrians who were not attending the funeral. Because the Phelpses had both the intent to intrude into a private, nonpublic forum, and succeeded in doing so, they should not be accorded the same First Amendment protection they might receive if they had simply been standing on a street corner to display signs to passing motorists, or even standing on the public sidewalk in front of this Court displaying signs to passing pedestrians.

B. Mourners Attending A Funeral Are A "Captive Audience".

In *Frisby v. Schultz*, 487 U.S. 474 (1988), the Court upheld a municipal ordinance prohibiting picketing "before or about" any residence or dwelling. The *Frisby* Court began its examination with the recognition that "[e]ven protected speech is not equally permissible in all places and at all times," and that "the standards by which limitations on speech must be evaluated 'differ depending on the character of the property at issue.'" 487 U.S. at 479. The Court emphasized the sanctity and privacy inherent in the home and the concomitant interest of the State in protecting "the well-being, tranquility, and privacy" of the home. *Id.* at 480. Finally, the Court pointed out that persons within their own home are a captive audience with no ability to avoid or retreat from unwelcome speech taking place immediately outside. *Id.* Thus, the Court held that "[t]he First Amendment permits the government to prohibit offensive speech as intrusive when the 'captive' audience cannot avoid the objectionable speech." *Id.* at 487; *cf. Carey v. Brown*, 447 U.S. 455, 478-79 (1980) (Rehnquist, J., dissenting) ("few of us would feel comfortable knowing that a stranger lurks outside our home").

In *Rowan v. United States Post Office Dep't*, 397 U.S. 728 (1970), the Court upheld a statute permitting individuals–assisted by the U.S. Postal Service–to preclude the delivery to their homes of some offensive mail. Indeed, the Court recognized that, at least in the home, people should have the right "to be free from sights, sounds, and tangible matter we do not want." *Id.*, at 736. In *Cohen v. California*, 403 U.S. 15 (1971), the Court struck down the disorderly conduct conviction of a man who wore a jacket with the inscription "Fuck the Draft" in a Los Angeles courthouse. Understandably, the Court in *Cohen* was reluctant to apply a "captive audience" rationale to justify the suppression of speech that was not targeting or being used to harass any particular individuals and which occurred passively in a public courthouse. But the facts of *Cohen* are significantly different from the situation here, not least because the Phelpses were specifically targeting the Snyders (and other mourners) who were attending a private funeral for a private citizen in a private facility (a church).[6]

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[6] Indeed, it has been observed that "[i]f the current Supreme Court were to expand the captive audience doctrine beyond the four walls of the home, churches present one of the strongest cases." Alan Phelps, Note, *Picketing and Prayer: Restricting Freedom of Expression Outside Churches*, 85 Cornell L. Rev. 271, 300 (1999). Moreover, the States' interest in protecting privacy and sanctity is even stronger in the context of private funeral services at churches than for general religious services.

Moreover, in *Cohen* the Court recognized that the "captive audience" rationale would permit restrictions on speech when "substantial privacy interests are being invaded in an essentially intolerable manner." *Id.* at 21.

The rationales that *Frisby, Rowan,* and *Cohen* recognized for restricting expressive activities apply with full force in the present case. The substantial privacy interests inherent in a private funeral proceeding for a private citizen held in a private facility are at least as significant as the privacy interests at stake in one's home. Like the residents inside a home, funeral attendees are a captive audience, with "no recourse of escape whatsoever." *Carey*, 447 U.S. at 479 (Rehnquist, J., dissenting). Importantly, the Phelpses deliberately and maliciously invaded the Snyders' privacy, not just in an "essentially intolerable manner," but in the most offensive and obnoxious manner anyone has ever utilized at private funerals. Like a private home, a private funeral service is a paradigm for a captive audience.

The Sixth Circuit reached that conclusion in *Phelps-Roper v. Strickland*, 539 F.3d 356 (6th Cir. 2008), a case involving the Phelpses' challenge to an Ohio statute that restricted their targeted picketing activities at funerals in Ohio. The Sixth Circuit observed that "[i]ndividuals mourning the loss of a loved one share a privacy right similar to individuals in their homes." *Id.* at 364-65. Moreover, the court recognized that "'deep tradition and social obligation, quite apart from the emotional support the grieving require,' compel individuals to attend a funeral or burial service," and "[f]riends and family of the deceased should not be expected to opt-out from attending their loved one's funeral or burial service." *Id.* at 366. Funeral attendees, just like residents at home, do not have the option of avoiding or retreating from unwelcome speech occurring at the funeral proceeding; they are a "captive audience." And, "it goes without saying that funeral attendees are also emotionally vulnerable," *id.*; in fact, they are if anything *more* emotionally vulnerable than typical residents in a private home. Thus, the Sixth Circuit concluded that "[u]nwanted intrusion during the last moments the mourners share with the deceased during a sacred ritual surely infringes upon the recognized right of survivors to mourn the deceased." *Id.* The Court should reach the same conclusion here.

C. Targeted Picketing Is An Intrusive And Harassing Method Of Expression With Limited Value In Public Discourse.

This Court and others long have recognized that targeted picketing inherently inflicts harms that do not accompany more generally utilized and accepted methods of communication, with the result that targeted picketing may receive less First Amendment protection than other methods of expression. For instance, in *Frisby* the Court made clear that targeted picketing does "not seek to disseminate a message to the general public, but to intrude upon the targeted resident, and to do so in an especially offensive way." 487 U.S. at 486. As Justice Stevens put it, "[p]icketing is a form of speech that, by virtue of its repetition of message and often hostile presentation, may be disruptive of an environment irrespective of the substantial message conveyed." *Id.* at 498 (Stevens, J., dissenting). One lower court summarized the Court's cases as follows: "In short, the United States Supreme Court has described targeted picketing as highly offensive conduct which is not entitled to the same level of First Amendment protection as is more general expression of political or social views." *City of San Jose v. Superior Court*, 38 Cal. Rptr. 2d 205, 209 (Cal. App. 1995).

In fact, the Phelpses' targeted picketing is directly analogous to and (other than subject matter) indistinguishable from the targeted picketing the Court held could be regulated in *Frisby*. Some of the Phelpses' signs and statements arguably may have been intended to serve a broader communicative purpose, but several signs were personal, and are reasonably construed as targeting the Snyders. Certainly, notwithstanding the Fourth Circuit's surprising conclusion to the contrary, the "Epic" the Phelpses published on their website after the protest directed personal attacks specifically at the Snyders.

Among the signs the Phelpses used to target the Snyders at their son's funeral were the following: "You're Going To Hell", "God Is Your Enemy", "God Hates You", "Thank God For Dead Soldiers", "Semper Fi Fags", and "Not Blessed Just Cursed." These signs are plausibly read as targeting Matthew Snyder and his family. These were not "War Is Wrong" or "U.S. Out Of Iraq" signs; they were personal and vicious attacks, fully intended to target the mourners and intrude on the privacy of the funeral.

But it gets worse, significantly so. In their "Epic", the Phelpses followed up their funeral attacks with even more personal invective directed at the Snyder family. In a document that begins with the title "The

Burden of Marine Lance Cpl. Matthew A. Snyder," the Phelpses proceed to quote Bible verses interspersed with vicious personal attacks on the Snyders, including the following:

> God blessed you, Mr. and Mrs. Snyder, with a resource and his name was Matthew. He was an arrow in your quiver! In thanks to God for the comfort the child could bring you, you had a DUTY to prepare that child to serve the LORD his GOD – PERIOD! You did JUST THE OPPOSITE – you raised him for the devil.
>
> You taught him that God was a liar. * * *
>
> Albert and Julie RIPPED that body apart and taught Matthew to defy his Creator, to divorce, and to commit adultery. They taught him how to support the largest pedophile machine in the history of the entire world, the Roman Catholic monstrosity. * * * They also, in supporting satanic Catholicism, taught Matthew to be an idolater. * * *
>
> God rose up Matthew for the very purpose of striking him down, so that God's name might be declared throughout all the earth. He killed Matthew so that His servants would have an opportunity to preach his words to the U.S. Naval Academy at Annapolis, the Maryland Legislature, and the whorehouse called St. John Catholic Church at Westminster where Matthew Snyder fulfilled his calling.

The Phelpses' messages, both at the funeral and in the Epic, target the Snyders personally and were intended to harass and inflict psychological injury. This Court and others have recognized that the Phelpses' chosen methods of communication are particularly intrusive and hostile, and thus are of less value than more conventional methods of sharing religious beliefs. The Court also has recognized that these methods are far more injurious to those targeted, and far more intrusive on substantial privacy interests, particularly when the audience is captive.

Because (1) funerals are unique in their sanctity and the substantial privacy interests inherent in them, (2) funeral attendees are a captive audience, and (3) the Phelpses' targeted picketing is a particularly intrusive and injurious method of expression with limited public value, the Court should reach the same result as in *Frisby*. Just as the *Frisby* Court ruled that "individuals are not required to welcome unwanted speech into their own homes and that the government may protect this freedom," 487 U.S. at 485, the First Amendment does not compel private families attending a private funeral for a lost child to welcome offensive and hostile targeted picketing into such solemn and sacred ceremonies. Instead, the States may protect the families' substantial privacy interests through content-neutral time, place, and manner regulations,[7] as well as the application of general tort law principles, as explained below.

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[7] As one First Amendment scholar puts it: "It is difficult to imagine a deeper intrusion into private life – or a more outrageous infliction of emotional distress – than a demonstration that intentionally interferes with the ability of family members to mourn a loved one in peace. To the extent that the protest disrupts a funeral, it also interferes with the mourners' right to religious or spiritual freedom. These injuries are not justified by the value of the speech, for the protesters have many other avenues of expression that do not have such a serious impact on the rights of others." Steven J. Heyman, FREE SPEECH AND HUMAN DIGNITY 15455 (Yale U. Press 2008).

II. The First Amendment Does Not Bar Tort Liability For Extreme And Outrageous Expression That Intentionally Inflicts Severe Emotional Distress On Targeted Private Citizens.

Introduction – The Tort Of Intentional Infliction Of Emotional Distress

No decision of this Court has ever exempted a non-media defendant from generally applicable state tort law on First Amendment grounds, and there is no reason to break such ground in this case. Even with media defendants, numerous decisions of the Court have emphasized that the First Amendment provides "no special immunity from the application of general laws," nor does it grant any special privilege "to invade the rights and liberties of others." *Branzburg v. Hayes*, 408 U.S. 665, 683 (1972). Indeed, the Court has observed that it is "well-established" that the First Amendment does not forbid enforcement of a state cause of action, based on laws of general applicability, against a party for damage caused by the party's speech. *Cohen v. Cowles Media Co.*, 501 U.S. 663, 669-70 (1991) (media defendant can be sued for "promissory estoppel" for publishing identity of an anonymous source when it had promised the source it would not do so).

For example, defamatory speech against private citizens is actionable, *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345-47 (1974), as is speech that portrays a plaintiff in a false light, *Cantrell v. Forest City Pub. Co.*, 419 U.S. 245 (1974); *Time, Inc. v. Hill*, 385 U.S. 374 (1967). Speech that violates copyright laws or offends a state-created "right of publicity" is also actionable. *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 574-75 (1977). These and many other decisions make clear that the First Amendment does not immunize the Phelpses from state tort liability simply because their activities may be characterized as expressive.

The States have a strong interest in shaping their tort law doctrines to protect the substantial privacy interests of their citizens, including protection from intentionally injurious and targeted picketing. Acknowledging such interests, the Court long has recognized that States "should retain substantial latitude" in protecting the privacy of private citizens. *Gertz*, 418 U.S. at 345-46. A jury in this case reasonably found that the Phelpses' conduct here satisfied the strict elements of a well-established state law tort of general applicability, a verdict that should be upheld.

The tort at issue here—the intentional infliction of emotional distress ("IIED")[8]—imposes such a high bar for recovery that its proper application establishes a very narrow limitation on expressive activities, and does so in a way that inflicts no harm on the First Amendment. Indeed, any federal constitutional concerns are satisfied by proper proof of a prima facie case of IIED. Furthermore, state courts long have recognized tort liability for intentionally inflicted emotional distress in cases involving the grieving families of the deceased: "there are a great many cases involving the mishandling of dead bodies, whether by mutilation, disinterment, interference with proper burial, or other forms of intentional disturbance." PROSSER AND KEETON ON TORTS 63 (5th ed. 1984) (footnotes omitted) (citing cases).[9] Today, these cases would be treated as IIED cases, and the point is that liability for interfering with interment of the deceased is deeply anchored in state tort law, predating even the recognition of the IIED tort.

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[8] As noted above in footnote 2, the States focus on the IIED tort because it provides the narrowest basis for upholding liability in this case.

IIED requires proof of (1) intentional or reckless conduct, (2) that is extreme and outrageous, and (3) that causes severe emotional distress in the plaintiff. See, e.g., RESTATEMENT OF TORTS 2D § 46(1). The first element imposes the same high standard – intent or recklessness – that the Court incorporated in the *New York Times* actual malice rule. Thus, IIED liability can only be found when there is a high degree of culpability. No accidental or unintended consequences can give rise to such liability.

Although tort cases applying the "extreme and outrageous" conduct element often have involved speech or expressive conduct, *see, e.g., State Rubbish Collectors Assoc. v. Siliznoff*, 240 P.2d 282 (Cal. 1952) (unlawful threats and intimidation by business competitors); *Jones v. Clinton*, 990 F. Supp. 657, 677 (E.D. Ark. 1998) (sexual propositions); *Halio v. Lurie*, 222 N.Y.S.2d 759 (1961) (taunting letters and jeering verses); *Ford v. Revlon, Inc.*, 734 P.2d 580 (Ariz. 1987) (vulgar remarks to co-worker); *Dreja v. Vaccaro*, 650 A.2d 1308 (D.C. App. 1994) (interview by police officer), state courts have been extremely stingy in finding conduct to rise to the level required to satisfy this element of the tort.[10] Moreover, this element is subject to significant control by the courts, because "[i]t is for the court to determine, in the first instance, whether the defendant's conduct may reasonably be regarded as so extreme and outrageous as to permit recovery . . . ." REST. 2D § 46, Comment h. Further, "[w]here reasonable men may differ, it is for the jury, subject to the control of the court, to determine whether, in the particular case, the conduct has been sufficiently extreme and outrageous to result in liability." *Id.*

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[9] RESTATEMENT OF TORTS 2D § 868 goes perhaps even further than the old cases, suggesting that "[o]ne who intentionally, recklessly or negligently removes, withholds, mutilates or operates upon the body of a dead person or prevents its proper interment or cremation is subject to liability to a member of the family of the deceased who is entitled to the disposition of the body."

Importantly, the law is clear that mere insults or annoying behavior will not satisfy this element of the tort; in fact, even epithets, profanity, and racial slurs may not suffice, unless other outrageous conduct is present. *See, e.g.*, *Slocum v. Food Fair Stores of Florida*, 100 So. 2d 396 (Fla. 1958) (statement to customer by employee that "you stink to me" not actionable); *Ugalde v. W.A. McKenzie Asphalt Co.*, 990 F.2d 239 (5th Cir. 1993) (Texas law, racial slur not actionable). It is also clear that context matters, and the "extreme and outrageous character of the conduct may arise from the actor's knowledge that the other is peculiarly susceptible to emotional distress, by reason of some physical or mental condition," RESTATEMENT OF TORTS 2D § 46, Comment f., and the "conduct may become heartless, flagrant, and outrageous when the actor proceeds in the face of such knowledge . . . ." *Id.* The Phelpses target grieving families like the Snyders precisely because such families are "peculiarly susceptible [and vulnerable] to emotional distress." *Cf. Delta Fin. Co. v. Ganakas*, 91 S.E.2d 383 (Ga. App. 1956) (threats to 11-year-old girl home alone that she would be taken to jail); *Brandon v. County of Richardson*, 624 N.W.2d 604 (Neb. 2001) (statements made by law enforcement officer to rape victim shortly after the crime had occurred).

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[10] "Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." RESTATEMENT OF TORTS 2D § 46, Comment d.

Finally, because IIED requires proof that the defendants have caused severe emotional distress, there is no risk of imposing liability when citizens are simply offended or irritated, even assuming the conduct is intentional and outrageous. In this regard, Snyder presented compelling evidence of the psychological harm he has suffered as a result of the Phelpses' targeting the family with their vicious attacks. Indeed, as the Fourth Circuit explicitly held, the Phelpses did not appeal the sufficiency of the evidence to support the jury's finding that they had committed IIED, nor realistically could they have done so. In fact, their conduct is the epitome of this tort; the Phelpses' actions were intentional, their unprecedented tactics are extreme and outrageous, and Mr. Snyder had overwhelming proof of the severe distress the Phelpses inflicted on him.

Importantly, holding the Phelpses' responsible here will not open the door to wide-ranging tort liability, both because the IIED tort is very restrictive and because no one else in the history of this country has utilized the Phelpses' tactics. No one else has ever engaged in the targeted picketing of funerals to attack the deceased and their grieving families, or used internet postings to terrorize the grieving. No one has engaged in copycat picketing since the Phelpses began their attacks, in spite of the obvious publicity and notoriety the Phelpses' tactics have gained them. No one. Thus, no traditional or necessary or even marginally valuable method of protest will be lost by holding the Phelpses accountable for their emotional terrorism.

IIED is appropriate in the circumstances presented here, and for decades state courts have applied and developed the IIED tort in abusive speech situations. This Court should hold that requiring proof of the elements of IIED is the full extent of the legal protection to which the Phelpses are entitled. Imposing further obstacles to liability in the name of the First Amendment, as the Fourth Circuit erroneously did here, is an unwarranted interference with decades of state tort jurisprudence. Further, imposing phantom First Amendment obstacles is legally unnecessary to protect public debate on public matters, and is not supported by a careful reading of this Court's defamation-oriented First Amendment precedents.

The Phelpses should not be permitted to wield the First Amendment as a sword to sever the States' ability to recognize and apply the IIED tort (and possibly others) from the States' general authority to create and mold tort law. The Phelpses are not media defendants reporting about public officials or figures, nor are they commenting on matters of public concern when they target the Snyders personally and attempt to draw this private family into the Phelpses' crusade. Especially for non-media defendants, the First Amendment creates no "special immunity from the application of general laws," nor is it a license "to invade the rights and liberties of others." *Branzburg*, 408 U.S. at 683. Rather, the Court should give effect to the States' traditional latitude to define and enforce tort remedies for intentional interference with privacy interests.

A. The Fourth Circuit Erred By Ignoring Critical Distinctions Between Private Citizen Plaintiffs And Public Official / Public Figure Plaintiffs, As Well As Between Media And Non-Media Defendants.

Two critical distinctions in this case which the Fourth Circuit effectively ignored are (1) that the plaintiff here, Mr. Snyder, is a private citizen, not a public official or a public figure, and (2) that the Phelpses are not media defendants reporting on matters of public concern. No prior First Amendment decision of this Court involves these two circumstances in the same case: a private plaintiff suing non-media defendants for expressive activities that violate well-recognized state tort law principles. Thus, no prior defamation decision of the Court involves facts directly analogous to the situation here.[11]

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[11] The Fourth Circuit recognized as much, pointing out that this Court has never "addressed the question of whether constitutional protections afforded statements not provably false should apply with equal force to both media and non-media defendants." *Snyder v. Phelps*, 580 F.3d 206, 220 n. 13 (4th Cir. 2009).

Of all the Court's First Amendment decisions, the most relevant and analogous is *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). The Fourth Circuit, however, virtually ignored *Gertz*, and instead relied heavily on *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990), and *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988), in reversing the verdict. As explained below, *Milkovich* and *Hustler* are the wrong reference points for deciding this case, while careful adherence to *Gertz* is crucial.

Gertz involved defamatory statements about a private attorney published in a nationally distributed periodical. The publisher of the periodical, relying on *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), argued that it could not be held liable for defamation under state tort law unless the plaintiff satisfied the "actual malice" standard. The Court rejected that argument, noting that "[t]he *New York Times* standard defines the level of constitutional protection appropriate to the context of defamation of a public person." 418 U.S. at 342. Instead, the Court found that "the state interest in compensating injury to the reputation of private individuals requires that a different rule should obtain with respect to them." *Id.* at 343.

The same conclusion holds here, and the reasons the *Gertz* Court gave for applying a different standard to private citizen defamation plaintiffs apply with equal if not more force in this case. The *Gertz* Court noted that "[p]rivate individuals are . . . more vulnerable to injury, and the state interest in protecting them is correspondingly greater." 418 U.S. at 344. Further, public officials and public figures have voluntarily placed themselves on the public stage, warranting less protection. Private persons, on the other hand, have not and retain all of their privacy interests. Accordingly, "private individuals are not only more vulnerable to injury than public officials and public figures; they are also more deserving of recovery." *Gertz*, 418 U.S. at 345. It was for these reasons that the *Gertz* Court recognized the "strong and legitimate state interest in compensating private individuals" for harmful speech, 418 U.S. at 348, and concluded that "the States should retain substantial latitude in their efforts to enforce a legal remedy" for speech harmful to a private individual. 418 U.S. at 345-46.

These same reasons and same interests are present here, where the Phelpses targeted private individuals attempting to grieve the death of their son at a private funeral. First, not only are private citizens such as the Snyders more vulnerable generally, "it goes without saying that funeral attendees are also emotionally vulnerable." *Phelps-Roper*, 539 F.3d at 366. Second, the Snyders were not public officials or public figures; they did nothing to seek a public stage. They wanted privacy, not publicity, for their son's funeral and their grief.

Moreover, this case does not raise any concern about media self-censorship or the potential to chill public debate, concerns that largely motivated the Court's decisions in cases against media defendants, such as *New York Times, Milkovich,* and *Hustler*. *Milkovich* in particular, which the Fourth Circuit called "crucial precedent," was an application of an earlier rule arising out of this Court's specific concern that "media defendants who publish speech of public concern" might be unconstitutionally deterred if they had to prove the truth of every assertion they make. *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 777 (1986); *Milkovich*, 497 U.S. at 20. That concern necessitated the rule in *Milkovich* and *Hepps*—on which the Fourth Circuit relied—that the First Amendment protected speech without a provably false assertion; but that concern does not exist when the defendant is not a member of the media in any sense.

Critically, and unlike *Milkovich*, *Hepps*, *Hustler*, and other such cases, this case does not involve a news organization, a book or magazine publisher, radio or television broadcasts, or a public media commentator of any sort. The Phelpses can make no legitimate claim to public media status. They are simply private persons who seek media attention by attacking private families at an especially vulnerable moment in one of the most outrageous ways imaginable. These factors distinguish this case from all others the Court has ever decided, and further weigh in favor of deferring to the "substantial latitude" the Court traditionally has afforded the States in resolving private disputes.

B. The Fourth Circuit Erred By Effectively Treating All Statements That Implicate Public Affairs As Involving Matters Of Public Concern, And All Outrageous And Intentionally Hurtful Statements As "Opinion", Immunized By The First Amendment.

Essentially, the Fourth Circuit concluded that so long as the Phelpses did not deliver messages that are provably false (the Fourth Circuit characterized the Phelpses' signs and the Epic as hyperbolic rhetoric), and some of their signs addressed public affairs (*e.g.*, war in Iraq, scandal in the Catholic Church), their activities are completely immunized by the First Amendment. According to the Fourth Circuit, that immunity applies no matter whether the plaintiff is a private citizen or a public figure, no matter whether the defendant is a media entity or a private citizen, no matter whether the speaker believes the statements to be true, and no matter whether the speaker intends the statements to inflict emotional harm on the target audience. Indeed, the Fourth Circuit seems to adopt a Catch-22 for private citizen plaintiffs: if the Phelpses' statements involve matters of public concern, then they are protected by the "actual malice" standard; if, on the other hand, the statements do not address matters of public concern, then they are protected because no reasonable listener would believe such hyperbole (even though the Phelpses absolutely believe what they are saying), making this protected "opinion."

The Fourth Circuit seems to have concluded that the Phelpses were expressing unverifiable opinions on matters of public concern, and thus the First Amendment insulated them from all legal responsibility for the intentional harms their actions caused. The Fourth Circuit was fundamentally wrong for at least two reasons, as further explained below. **First**, the Phelpses were not addressing a matter of public concern when they attacked purely private citizens. Not only did their messages include private themes in addition to public ones, but their efforts to exploit the grief and dignity of private citizens in order to gain publicity should not result in characterizing their methods as discussion on a matter of public concern, although that seems to be what the Fourth Circuit held.

Second, the Phelpses are not asserting exaggerated opinions or hyperbolic overstatements for rhetorical purposes. The Phelpses cannot and do not claim that their messages are parody or satire; *they mean every word they say*, at least perhaps until they get sued and try to rewrite their motives in litigation. Yet the Fourth Circuit immunized the Phelpses from liability in part because their statements were so outrageous and vile. That result turns traditional tort law on its head: the messages were much more likely to inflict serious emotional harm on their target precisely because they were so unconscionable. In fact, the Fourth Circuit created a perverse incentive for emotional terrorists to be outrageous and extreme, because First Amendment immunity will apply if reasonable people would not actually believe the statements.

Thus, under the Fourth Circuit's reading of *Milkovich* and *Hustler*, private citizen speakers have an incentive to speak in especially inflammatory – even abusive and malicious – terms. The more outrageous the attack on others, the more likely such statements will be deemed either (1) hyperbole (*i.e.*, protected "opinion") or (2) incapable of being proven false (protected by the "actual malice" rule so long as the statements have any connection to public affairs). The reality, however, is that the more abusive and outrageous the statements the more effectively such efforts will terrorize the target captive audience of private citizens. The Phelpses intentionally strike at private American families who are grieving, a setting in which such families are at their most vulnerable, one of the worst imaginable times of suffering that any family may ever experience—the violent death of a child.

With all due respect, the Fourth Circuit dramatically misread the Court's decisions in both *Hustler* and *Milkovich*. *Hustler* dealt with the parody of a public figure by a media defendant, and such matters are effectively per se matters of public concern, at least under current doctrine. Here, none of those circumstances are present: the Snyders are not public figures, the Phelpses are not media defendants, and there is no parody. Likewise, *Milkovich* does not purport to immunize all statements that arguably can be labeled "opinion"; indeed, the essential holding of *Milkovich* is that statements cannot be per se immunized by such labels.

1. The Phelpses' Attacks On Matthew Snyder And His Family Did Not Address Matters Of Public Concern.

A crucial flaw in the Fourth Circuit's reasoning is that the Phelpses' statements in this case address matters of public concern when they implicate Matthew Snyder and his family personally in the Phelpses' religious crusade. Of course topics like war, homosexuals serving in the military, and scandal within major religious institutions are of interest to the public. But the question of what is a matter of public concern should not be answered, and in all fairness cannot be answered, without reference to the privacy interests of the citizens the Phelpses are implicating in—and attempting to connect to—their picketing topics. Instead, the determinative question should be, "what connection does *the plaintiff* have to the speech at issue?"

The public attention that the Phelpses' antics brought to Matthew Snyder's funeral does not make

Matthew Snyder or his family public figures. It was the Phelpses who thrust the Snyder family into the unwelcome glare of national media coverage; it was the Phelpses who transformed a solemn and sacred private proceeding into a media circus. Until the Phelpses came along, this country and the media did not know of Matthew Snyder or his family.

Essentially, the Fourth Circuit permitted the Phelpses to bootstrap in the most egregious fashion imaginable. Under the Fourth Circuit's analysis, all the Phelpses have to do to obtain First Amendment immunity is carry pickets that mention or implicate war, and they are then free to attack personally *any soldier* and *any soldier's family,* no matter the circumstances or the methods utilized. That result obtains even though the private citizens being targeted have never sought the public eye, and even though the speaker's specific intent is to harm these private citizens. That result is wrong; the Phelpses' targeted personal abuse of private citizens should not be mischaracterized as protests on matters of public concern.

Instead, when a speaker targets a particular private individual or family, the critical analysis is whether the plaintiffs have a significant and personal connection to a matter of legitimate public concern. Otherwise, the door is wide open for speakers to criticize any and all members of a given class whenever that class as a whole is implicated in some way in a matter of public concern. Properly, this Court has never viewed the situation that way. For example, in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), the Court made clear that the topic of public concern was the allegation that the plaintiff lawyer had participated in framing a Chicago police officer who was being prosecuted for murder. If the speaker's claim had been more general (*e.g.*, "that all lawyers are scoundrels"), and the speaker had leveled a personal attack against Gertz, it seems clear the Court would not have deemed such speech to involve a matter of public concern with respect to Gertz personally. In sharp contrast, however, the Fourth Circuit's rationale would protect a personal attack against *any* lawyer under the banner of "all lawyers are scoundrels."

Similarly, in *Time, Inc. v. Firestone*, 424 U.S. 448 (1990), the Court refused to hold that any "public controversy" is necessarily a matter of public concern for purposes of applying the actual malice rule. Instead, the Court rejected the argument that the lurid details of a divorce in a wealthy family were a matter of public concern, even though some in the general public might well have considerable interest in such details. Again, in sharp contrast, the Fourth Circuit's reasoning would permit the Phelpses to engage in targeted picketing on the sidewalks outside the homes or offices of divorcees so long as the Phelpses carried some signs that, for example, decried the breakdown of marriage in this country, high rates of divorce, adultery, and the like. Because such topics are matters of public concern, the Phelpses could target anyone who is or ever has been divorced. Further, the more outrageous the claims made (e.g., "God Hates Divorcees"), the more likely the statements would be absolutely protected under the Fourth Circuit's analysis. Again, with all due respect, the Fourth Circuit misread this Court's cases.

2. The First Amendment Does Not Immunize The Phelpses' Statements Because They Are Not Provably False.

The Fourth Circuit's expansion of *Hustler* fails to respect the "substantial latitude" that the Court historically has accorded the States in the area of tort law generally, and in the context of privacy and emotional distress torts in particular. The Fourth Circuit effectively immunized all outrageous statements from any tort liability because they cannot be proven false. Of course, no one can know who or what, if anything, "God Hates." But that answer begs the question whether the Phelpses' malicious and hateful messages targeting private citizens merit First Amendment protection. The Fourth Circuit's analysis also ignores the emotionally devastating effect that outrageous and unprovable statements can have on targeted private citizens who necessarily cannot defend themselves from such unprovable claims.

Under the Fourth Circuit's analysis, the Phelpses would walk away, scot-free, from the emotional devastation they have wrought. Meanwhile, private American families like the Snyders, the Shepards, and others are caught in an inescapable constitutional Catch-22: if the Phelpses' statements are not about these families personally, then such statements are protected as "opinions" addressing matters of public concern; but if the Phelpses' statements are about these families personally, then the statements are protected as unprovable hyperbole. Either way, the families and the States lose.

The Court's cases do not require such a repulsive result. When public officials and public figures engage in heated debate over public issues they may engage in hyperbole, using strong rhetoric and sometimes overactive imaginations. The fact that such tactics are tolerated in that context does not mean they must be embraced in all contexts. Just as a "true threat" may be prohibited, indeed criminalized, even though it is speech and may express an opinion, *cf. Virginia v. Black*, 538 U.S. 343 (2003), the Phelpses' statements may subject them to liability under the rigorous standards of IIED. The Constitution does not stand in the way of the States acting to prevent the Phelpses from hijacking solemn funeral proceedings for their own hateful purposes at the expense of grieving American families.

CONCLUSION

The judgment of the Fourth Circuit immunizing the Phelpses from all responsibility for their intentional infliction of emotional distress must be reversed.

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AMICUS
CURIAE
BRIEF

No. 09-751

IN THE SUPREME COURT OF THE UNITED STATES

ALBERT SNYDER,

Petitioner

v.

FRED W. PHELPS, SR., ET AL.,

Respondents

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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INTEREST OF AMICUS CURIAE[1]

Liberty Counsel is a national nonprofit litigation, education and policy organization dedicated to advancing religious freedom, the sanctity of human life and the traditional family. Founded in 1989 by Anita and Mathew Staver, who also serves as the Dean of Liberty University School of Law, Liberty Counsel has offices in Florida, Virginia, Texas and Washington, D.C., and has hundreds of affiliate attorneys in all fifty states. A significant part of Liberty Counsel's work involves representing individuals and organizations whose First Amendment rights are threatened by or have been infringed by governmental agencies or individuals who disagree with their message.

Sanctions such as the civil damages award in this case pose a significant threat to bedrock First Amendment freedoms as they will act to chill the very kind of controversial speech the Founders sought to protect when they enacted the First Amendment. It is critically important that citizens' free speech rights not be sacrificed in order to protect others from having to encounter offensive or controversial speech. If sanctions such as the underlying damage award are permitted to stand, then it will cause a ripple effect that will undermine the foundational freedoms upon which this country was founded.

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[1] Counsel for a party did not author this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity, other than *Amicus Curiae* or its counsel made a monetary contribution to the preparation and submission of this brief. The parties have consented to the filing of this brief and such consents are being lodged herewith.

Liberty Counsel does not endorse the message contained in the Respondents' signs and other communications. In fact, Liberty Counsel expressly condemns the offensive tactics of Respondents and the content of their rhetoric. However, Liberty Counsel stands with the Founders in supporting the right of Respondents and other citizens to present messages of their choosing, even offensive messages, without the chilling effect of tort or other liability or governmental censure. Liberty Counsel is concerned about the effects this case could have on the free speech rights of individuals and organizations who wish to exercise their First Amendment rights. Liberty Counsel respectfully submits this Amicus Curiae Brief to provide this Court with information and arguments that may be of assistance in analyzing the constitutional issues raised by this case.

SUMMARY OF ARGUMENT

This Court carefully balanced the Founders' commitment to protecting robust debate with the ancient concept that "a man's home is his castle" by utilizing the doctrine of a "captive audience" to protect the sanctity of the home from unwelcome intrusion. *Rowan v. United States Post Office Dep't*, 397 U.S. 728, 737 (1970). With rare exceptions, this Court has rejected efforts to expand the doctrine beyond the personal residence and its environs. *Cohen v. California*, 403 U.S. 15 (1971); *Forsyth County v. Nationalist Movement*, 505 U.S. 123 (1997). Even in circumstances in which a person is compelled to be present, such as in a courthouse, this Court has not expanded the "captive audience" doctrine, even when the same speech could be sanctioned if played over the airwaves. *Cohen*, 403 U.S. at 21.

Even when minors are the likely audience for particular speech and are compelled to be present where the activity occurs, this Court has permitted only a limited use of the "captive audience" doctrine. *Bethel School Dist. v. Fraser*, 478 U.S. 675 (1986). As is true in other contexts, in the school context this Court has carefully balanced the need to protect young children from inappropriate messages with students' and others' free speech rights under the First Amendment. *Id.; Grayned v. City of Rockford*, 408 U.S. 104 (1972). Therefore, public school students do not shed their First Amendment rights at the schoolhouse gate, but can express themselves, even in controversial or unpopular ways, so long as they do not materially disrupt school operations or infringe upon the rights of others. *Tinker v. Des Moines Indep. School Dist.*, 393 U.S. 503, 513 (1969). Students might be compelled to be at school, but that does not immunize them, any more than it immunizes adults, from having to encounter unpopular messages. *Id.*

Similarly, in the abortion clinic context, where patients have been found to be "held captive by medical circumstance," this Court has refused to extend the "captive audience" doctrine beyond what is necessary to protect the safety of the patients. *Madsen v. Women's Health Center,* 512 U.S. 753 (1994), *Schenck v. Pro-Choice Network of Western New York,* 519 U.S. 357 (1997). As is true in the school context, in the abortion clinic context this Court has struck a delicate balance between the patients' right to unimpeded access for medical procedures and speakers' rights to communicate their message. *Madsen*, 512 U.S. at 773, *Schenck*, 519 U.S. at 377.

Petitioner is asking this Court to upset the delicate balance and expand the "captive audience" doctrine to permit funeral goers to obtain civil money damages against a group of passive protesters standing more than 1,000 feet from the site of a funeral. Underlying Petitioner's and his amici's proposed unprecedented expansion of the "captive audience" doctrine is the desire to strip speech they define as "offensive," "hostile," "intrusive," and "unwelcome" of any First Amendment protection. Statements such as: "Respondents' speech warrants little, if any, First Amendment protection," (VFW Brief, p.6 n.5), and Respondents "should not be accorded the same First Amendment protection they might receive if they had simply been standing on a street corner to display signs to passing motorists..." (See Brief of the State of Kansas, 47 Other States, and the District of Columbia as Amici Curiae, "States' Brief," p. 11), reveal amici's true motivation – to make First Amendment rights dependent upon the perceived "value" or desirability of the speech. (States' Brief, p. 14: "Targeted Picketing Is An Intrusive and Harassing Method of Expression With Limited Value in Public Discourse."). Petitioner's proposed redefinition of the "captive audience" doctrine would render the First Amendment a meaningless shell as one person's First Amendment rights would be dependent upon the acceptability of his speech to third parties. Petitioner's proposal to place a veto power in the hands of listeners to others' speech undermines the very foundation of the First Amendment contrary to this Court's consistent protection of robust debate and invited dispute. *See e.g., Boos v. Barry,* 485 U.S. 312, 322 (1988): *New York Times Co. v. Sullivan,* 376 U.S. 254 (1964); *Terminiello v. Chicago,* 337 U.S. 1, 4 (1949). If Petitioner's redefinition of "captive audience" were to become reality, the First Amendment will be left gasping for air.

This Court should not permit the premature death of the First Amendment proposed by Petitioner's and amici's proposed redefinition of "captive audience" to include attendees at a funeral at which protesters offer passive speech more than 1,000 feet away.

LEGAL ARGUMENT

I. THE CONCEPT OF "CAPTIVE AUDIENCE" AS ENVISIONED BY PETITIONER AND HIS AMICI WOULD BE AN UNWARRANTED EXPANSION, NOT A NATURAL EXTENSION, OF THIS COURT'S PRECEDENTS.

Contrary to the VFW's assertion, expanding the doctrine of "captive audience" to those attending a funeral for a fallen soldier is not merely a "natural extension" of this Court's precedents. Instead, the proposed redefinition of the concept of "captive audience" represents a startling and sweeping departure from this Court's careful, speech-protective definition of the concept. This Court has limited the "captive audience" restriction on First Amendment activities to private homes, medical facilities, mass transit vehicles and school campuses during mandatory scheduled events. Other locations where presence is compelled, such as courthouses, have not been included in the definition of "captive audience," even when the message contains a personally provocative expletive that could not be uttered on the airwaves without government sanction. *Cohen v. California,* 403 U.S. 15 (1971).

Without referencing the actual facts of this case, Petitioner and his amici ask this Court to analogize the Snyder funeral service to a private home and expand the concept of "captive audience" to those attending a memorial service. Petitioner correctly asserts that this Court has stressed the uniqueness of the home as a refuge, but goes on to claim that the "rationale" of the captive audience decisions should be applied to this case without offering any analysis to substantiate the claim. (Petitioner's Brief, p. 47). Similarly, Amici States offer no legal analysis, but merely conclude that "[l]ike a private home, a private funeral service is a paradigm for a captive audience." (States' Brief, p. 13). In order to reach that conclusion, Amici States must paint a picture of a private family funeral service held in a private facility with protesters blocking the entrance and disrupting a religious ceremony. (*Id.* at 13). Similarly, Amici VFW claim that funerals are like homes and hospitals because they are places of refuge, "a forum for intimate gatherings of families and friends....a sanctuary and place of retreat, the last citadel of sorrow and grief," conjuring up images of an intimate family gathering at a gravesite or in a funeral home. (VFW Brief, p. 8).

While the portraits painted by the States and VFW might be compelling, they do not comport with the reality of this case and, therefore, cannot form the basis for their proposed expansion of the "captive audience" concept. This was not a private family gravesite service, but was a service attended by over 1,000 people, publicized in the news media and on the funeral home's website with the date, time and location included. (Respondents' Brief, p. 5). The news media filmed the funeral procession, and a group of motorcycle riders and students demonstrated outside the church near Respondents. (Respondents' Brief at 6). Respondents stood on a public right of way chosen by one of the priests, which was 1,000 feet away from the church, away from the entrance used by those attending the funeral. (Respondents' Brief at 7). Respondents did not attend the service or enter the church, and left the property before the service ended. (Respondents' Brief at 8). Petitioner was not even aware of Respondents' presence until after the funeral. (Respondents' Brief at 9-10). This was not the kind of intimate, personal gathering and place of retreat that Petitioner and his amici claim, and therefore is not analogous to a private home worthy of protection from intrusion.

As Petitioner stated, this Court has not considered whether an individual attending a family member's funeral has a privacy interest that warrants protection from unwanted speech. (Petitioner's Brief, p. 49). Nothing in this Court's precedents suggest that the captive audience concept should be extended to such circumstances, and the facts of this case clearly do not justify such an expansion. Any expansion of the "captive audience" doctrine necessarily entails a corresponding contraction of the right of free speech.

A. This Court Has Used The "Captive Audience" Doctrine To Protect The Long-Established Sanctity Of The Home From Unwanted Intrusion.

Building upon the ancient concept that "a man's home is his castle into which not even the king may enter," this Court first defined the concept of a captive audience when it upheld a federal statute under which a person could require that a mailer remove the person's name from mailing lists and stop all future mailings to the household. *Rowan v. United States Post Office Dep't*, 397 U.S. 728, 737 (1970). The Court found the statute to be a logical extension of the "right of a householder to bar, by order or notice, solicitors, hawkers, and peddlers from his property" since the mailer's right to communicate was circumscribed only by an affirmative act of the addressee giving notice that he wishes no further mailings from that mailer. *Id.* "To hold less would tend to license a form of trespass and would make hardly more sense than to say that a radio or television viewer may not twist the dial to cut off an offensive or boring communication and thus bar its entering his home." *Id.* "Nothing in the Constitution compels us to listen to or view any unwanted communication, whatever its merit; we see no basis for according the printed word or pictures a different or more preferred status because they are sent by mail." *Id.* "That we are often 'captives' outside the sanctuary of the home and subject to objectionable speech and other sound does not mean we must be captives everywhere." *Id.* at 738. This Court emphasized that the sanctity of the home from intruders, not the content of the speech, was the driving force behind its decision.

In *FCC v. Pacifica Found*ation, 438 U.S. 726, 748 (1978) ("*Pacifica*"), the Court found that the pervasive nature of the broadcast media, coupled with the individual's right to privacy *in his home* warranted government restrictions against the broadcast of patently offensive and indecent material over the airwaves. Citing to *Rowan*, this Court said, "[p]atently offensive, indecent material presented over the airwaves confronts the citizen, not only in public, but also in the privacy of the home, where the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder." *Id.* The Court emphasized that "the fact that society may find speech offensive is not a sufficient reason for suppressing it." *Id.* at 745. It is only when patently offensive words are broadcast over the airwaves so as to invade *the privacy of the home* that restrictions on free speech are warranted. *Id.* at 748. As in *Rowan*, so in *Pacifica* it was the invasion of the sanctity of the home that was the critical factor in restricting speech.

Similarly, in *Frisby v. Schultz*, 487 U.S. 474 (1988), this Court emphasized the need to protect people from invasion into their homes. The Court upheld an ordinance that prohibited picketing "before or about any individual's residence." The Court again emphasized that the home is different from other venues in terms of free speech restrictions. *Id.* at 484. "Although in many locations, we expect individuals simply to avoid speech they do not want to hear, (citations omitted) the home is different." *Id.* "[A] special benefit of the privacy all citizens enjoy within their own walls, which the State may legislate to protect, is an ability to avoid intrusions. Thus, we have repeatedly held that individuals are not required to welcome unwanted speech into their own homes and that the government may protect this freedom." *Id.* at 484-485. Even though speech restrictions might be unconstitutional in other contexts, "the State's interest in protecting the well-being, tranquility, and privacy of the home is certainly of the highest order in a free and civilized society" which justifies regulations aimed at protecting citizens from unwanted intrusions. *Id.* at 484. This Court emphasized that the ability to restrict speech, even in the residential context, is very narrow. The anti-picketing ordinance was held to be constitutional only after the Court was satisfied that the ordinance permitted ample alternative means of communication, including entering residential neighborhoods, walking a route in front of an entire block of houses, going door to door to proselytize or distribute literature, and contacting residents through the mail or by telephone short of harassment. *Id.* No such alternative means exist here. Respondents were already standing on a public right of way more than 1,000 feet from the site of the memorial service. If Respondents cannot stand even 1.000 feet away while passively holding signs, there is no reasonable place in which they could stand and effectively present their message. While that might be Petitioner's intent, it is not constitutionally permissible.

Even when agreeing that citizens had a right to avoid unwanted, offensive intrusions into their homes, this Court has always protected the fundamental right to engage in controversial, even offensive, speech. The protective bubble over a person's home does not travel with the person to other places where he might encounter unwelcome speech, such as a memorial service. Furthermore, this Court has not afforded protection, even in the home, when the intended audience could neither hear nor see the message from his home, as Petitioner and his amici are proposing here. The Court should proceed with caution into an area with the potential for such grave restrictions on fundamental First Amendment rights, no matter how "captive" Petitioner might subjectively feel.

B. This Court Has Declined To Apply The "Captive Audience" Doctrine To Courthouses, Even Though The Courthouse Audience Is Arguably More "Captive" Than The Funeral Goers In This Case.

As "captive" as Mr. Snyder and others might feel at a memorial service, those who are summoned to appear in court, who face incarceration or civil fines if they fail to appear, are even more so. Understandably, Mr. Snyder and others might believe they would suffer an intangible sense of personal loss if they could not attend a memorial service. However, a criminal or civil defendant, witness, or juror who fails to appear in court when summoned faces a very real and tangible loss of personal liberty or financial sanction. Consequently, any interest in protecting a "captive audience" from offensive or controversial speech is arguably greater in a courthouse than at a memorial service. Nevertheless, this Court has declined to extend the "captive audience" doctrine to people present in or around courthouses. *United States v. Grace*, 461 U.S. 171 (1983); *Cohen v. California*, 403 U.S. 15 (1971). If the doctrine does not apply to those legally obligated to be present in a building, then it should not apply to those who not legally obligated to attend a memorial service, regardless of any sense of personal obligation they might believe compels their attendance.

In *Pacifica,* this Court cited *Cohen* to emphasize the importance of context when analyzing restrictions on First Amendment activity. *Pacifica,* 438 U.S. at 747 n25. As the Court noted, there is a great deal of difference between a vulgar monologue broadcast over the airwaves, which can be subject to civil sanctions, and Mr. Cohen's vulgar message carried on his jacket through a courthouse corridor, which cannot be sanctioned by criminal prosecution. *Id.*

In *Cohen* this Court specifically rejected the argument that people in a courthouse were captive to Mr. Cohen's expletive-laden jacket. *Cohen,* 403 U.S. at 21. "Of course, the mere presumed presence of unwitting listeners or viewers does not serve automatically to justify curtailing all speech capable of giving offense." *Id.*

> While this Court has recognized that government may properly act in many situations *to prohibit intrusion into the privacy of the*

> *home of unwelcome views and ideas which cannot be totally banned from the public dialogue,* e.g., *Rowan v. United States Post Office Dept.,* 397 U.S. 728, 90 S.Ct. 1484, 25 L.Ed.2d 736 (1970), we have at the same time consistently stressed that 'we are often 'captives' outside the sanctuary of the home and subject to objectionable speech.' *Id.*, at 738, 90 S.Ct., at 1491. The ability of government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is, in other words, dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner. Any broader view of this authority would effectively empower a majority to silence dissidents simply as a matter of personal predilections.

Cohen, 403 U.S. at 21 (emphasis added). This Court added that, "while it may be that one has a more substantial claim to a recognizable privacy interest when walking through a courthouse corridor than, for example, strolling through Central Park, surely it is nothing like the interest in being free from unwanted expression in the confines of one's own home." *Id.* at 21-22. Petitioner and his amici's attempt to expand the concept of "captive audience" to mourners at a funeral exemplifies the dangers spoken of in *Cohen*, *i.e.*, that the mere presumed presence of an unwitting listener should curtail speech such as the Phelpses' that might offend someone, and that a majority would seek to silence dissidents as a matter of personal predilection.

As this Court has made clear, "[t]he plain, if at times disquieting, truth is that in our pluralistic society, constantly proliferating new and ingenious forms of expression, 'we are inescapably captive audiences for many purposes.'" *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 209-210 (1975) (*citing Rowan* 397 U.S. at 736). "Much that we encounter offends our esthetic, if not our political and moral, sensibilities." *Id.* "Nevertheless, the Constitution does not permit government to decide which types of otherwise protected speech are sufficiently offensive to require protection for the unwilling listener or viewer." *Id.* Rather, except in the rare cases of "fighting words," obscenity, or language intruding upon the sanctity of the home, "the burden normally falls upon the viewer to 'avoid further bombardment of (his) sensibilities simply by averting (his) eyes.'" *Id.* at 211 (citing

Cohen, 403 U.S. at 21). In this case, not only was averting one's eyes possible, but actually occurred, as the Phelpses' demonstration was held 1,000 feet away from the memorial service on a public right of way and was not in fact viewed by Mr. Snyder or others at the service.

This Court's opinion in *Grace* further illustrates the great divide between the Court's precedents and Petitioner's request to expand the "captive audience" doctrine to the facts of this case. *Grace*, 461 U.S. at 182. In *Grace*, this Court struck down a federal statute banning distributing of leaflets or the display of banners or signs on the sidewalk outside of the Supreme Court building. *Id.* This Court emphasized that public rights of way are traditional public fora, in which speech restrictions must survive strict scrutiny. *Id.* Furthermore, as was true with the Phelpses' demonstration, in *Grace*, the speakers did not obstruct the sidewalk or access to the building and did not interfere with the orderly administration of the building. *Id.* Those who were legally obligated to enter the Supreme Court building were not "captive" to any messages that might be presented on the sidewalk. *Id.* Likewise, those attending the Snyder funeral were in no way "captive" to the messages presented by the Phelpses more than 1,000 feet away on a public right of way.

When viewed in light of this Court's precedents, it becomes clear that Petitioner and his amici are not trying to protect a "captive audience" from intrusive and offensive speech, but are instead attempting to silence the Phelpses', and by extension, other controversial messages, that might be disturbing. This Court should reject those efforts and protect the fundamental right to free speech.

C. This Court's Limited, Balanced Application Of The "Captive Audience" Doctrine In The Public School Context Does Not Support Petitioner's And His Amici's Proposed Expansion Of The Doctrine To Memorial Services.

In response to two factors that are not present in this case, this Court has applied the "captive audience" doctrine in the public school context. *Bethel School Dist. v. Fraser*, 478 U.S. 675 (1986); *Lee v. Weisman*, 505 U.S. 577, 631 (1992) (Blackmun, J. concurring); *Grayned v. City of Rockford*, 408 U.S. 104 (1972). However, even though students are compelled to be at school and are more vulnerable than adults to offensive speech, this Court has declined to extend the "captive audience" doctrine to all speech that happens to occur on campus. *See Tinker v. Des Moines Indep. School Dist.*, 393 U.S. 503 (1969). "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Id.* at 506. A public school student may express his opinions, even unpopular ones, "if he does so without materially and substantially interfering with the requirements of appropriate discipline in the operation of the school and without colliding with the rights of others." *Id.* at 513. Notably, *Tinker* involved, as does this case, messages that some would find offensive dealing with a controversial military conflict. *Id.* at 510-512. Furthermore, the speech in *Tinker* was directed to and seen by minors who were compelled to be at school and could not avoid the message. *Id.* Nevertheless, this Court did not extend the "captive audience" doctrine to restrict the protesting students' speech. *Id.* at 514.

When this Court did apply the "captive audience" doctrine to public school students, it did so in a narrow and carefully crafted manner that preserved students' First Amendment rights as defined in *Tinker*. *Fraser*, 478 U.S. at 684. The Court was careful to draw distinctions between the politically controversial nature of the silent protests in *Tinker* and the explicitly sexual nature of the student's speech in *Fraser*. *Id.* It was the sexually explicit nature of the speech, compulsive attendance and the age of the audience that distinguished the speech in *Fraser* from the protest in *Tinker* and justified the differential treatment. *Id.* "This Court's First Amendment jurisprudence has acknowledged limitations on the otherwise absolute interest of the speaker in reaching an unlimited audience where the speech is sexually explicit and the audience may include children." *Id.* (citing *Ginsberg v. New York,* 390 U.S. 629 (1968), which upheld restrictions on the sale of sexually oriented materials to minors, and *Board of Educ. v. Pico,* 457 U.S. 853, 871-872 (1982), in which the Court acknowledged that the school board had the authority to remove books that were vulgar). "These cases [*Ginsberg* and *Pico*] recognize the obvious concern on the part of parents, and school authorities acting *in loco parentis*, to protect children–especially in a captive audience–from exposure to sexually explicit, indecent, or lewd speech." *Id.* There are no such concerns here, and therefore, no justification for extension of the "captive audience" doctrine to this case.

In *Grayned,* this Court reiterated the continuing validity of *Tinker* and the limited applicability of the "captive audience" doctrine even in public schools when it invalidated prohibitions against picketing on a public right of way within 150 feet of a school from thirty minutes before the start of the school day until thirty minutes after school was dismissed. *Grayned*, 408 U.S. at 118. "Just as *Tinker* made clear that school property may not be declared off limits for expressive activity by students, we think it clear that the public sidewalk adjacent to school grounds may not be declared off limits for expressive activity by members of the public. But in each case, expressive activity may be prohibited if it 'materially disrupts classwork or involves substantial disorder or invasion of the rights of others.'" *Id.* (citing *Tinker*, 393 U.S. at 513).

If an ordinance prohibiting picketing within 150 feet of a public school, where children are compelled to attend, cannot be validated through the "captive audience" doctrine, then a demonstration held 1,000 feet from a memorial service which no one is legally compelled to attend, can justify application of the doctrine. Petitioner and their amici's request to expand the doctrine should be rejected.

D. This Court Has Declined To Apply The "Captive Audience" Doctrine Even When The Speaker Clearly "Targeted" A Particular Audience With A Provocative Message Designed To Offend.

Petitioner and his amici attempt to distinguish this case from other cases which rejected the "captive audience" doctrine by claiming that the Phelpses "targeted" the Snyder family. However, even in situations which more clearly targeted a particular audience in a more directly provocative manner, this Court has refused to expand the captive audience concept as Petitioner requests. *Forsyth County v. Nationalist Movement*, 505 U.S. 123 (1992); *National Socialist Party v. Skokie*, 432 U.S. 43 (1977).

In *Forsyth County*, the Nationalist Movement wanted to have a "white pride" rally in a rural county that, as this Court said, suffered from a "troubled racial history." *Forsyth County*, 505 U.S. at 125. After two prior racially motivated incidents the county imposed a discretionary parade fee designed to reimburse the government for extra fees expended to "maintain public order." *Id.* When the Nationalist Movement sought permission to hold a rally to protest the Dr. Martin Luther King, Jr. federal holiday, the county imposed a $100 fee. *Id.* This Court found the fee facially unconstitutional. *Id.* at 137.

In *Skokie,* this Court required that the Illinois Supreme Court stay an injunction against the National Socialist Party of America, which wanted to hold a pro-Nazi march through a residential neighborhood with a large Jewish population, many of whom were holocaust survivors. *Skokie,* 432 U.S. at 43. While not ruling on the merits, this Court indicated that the injunction was overly broad and should be significantly modified, if not overturned. *Id.* at 45. What is notable about the *Skokie* decision is that this Court did not assume that the "captive audience" doctrine would apply, even though the Nazi group intended to walk in front of holocaust survivors' homes displaying messages aimed at displaying the group's hatred for the Jewish people. *Id.*

If a Nazi march right in front of the homes of Jewish holocaust survivors and a "white pride" rally against honoring an African-American civil rights leader are insufficient to trigger the "captive audience" doctrine, then the Phelpses' demonstration more than 1,000 feet away from a publicly advertised memorial service and unseen by the attendees cannot meet the definition. Petitioner's and his amici's claim that the Phelpses "targeted" a "captive audience" of funeral goers finds no support in this Court's precedents and should be rejected.[2]

Try as they might, Petitioner and his amici cannot fit the square peg of a funeral service into the round hole of a captive audience. This Court has rarely applied the "captive audience" doctrine outside of the residential context. When it has done so, it has been to address very specific concerns that are not applicable in this case, such as protecting minors in a public school from sexually explicit speech during instructional hours. *Fraser,* 478

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[2] *Lehman v. Shaker Heights*, 418 U.S. 298 (1974), cited by Amicus VFW in a footnote, did not, as amicus suggests, widen the definition of captive audience in a way that would apply to this case. Passengers on a streetcar are much more akin to someone sitting in their home than to someone attending a funeral. They are physically confined within a space from which they cannot easily exit, which makes any intrusion more invasive than even a protest directly in front of a funeral service, let alone one that is 1,000 feet away.

U.S. at 684. This Court has declined to apply the "captive audience" doctrine in public contexts when the audience was arguably even more "captive" than the funeral goers in this case, such as criminal defendants or others required by law to be present in a courthouse. *Cohen*, 403 U.S. at 21. Petitioner asks this Court to expand the "captive audience" doctrine farther than the Court has ever taken it. This Court should reject that request, particularly under the facts of this case.

II. NEITHER *HILL V. COLORADO* NOR THE OTHER ABORTION CLINIC "BUFFER ZONE" CASES CAN BE READ TO SUPPORT PETITIONER'S PROPOSED EXPANSION OF THE "CAPTIVE AUDIENCE" DOCTRINE.

Petitioner and his amici rely upon *Hill v. Colorado*, 530 U.S. 703 (2000) as precedent for their proposed expansion of the "captive audience" doctrine. However, the inconsistencies between *Hill* and other First Amendment cases and between *Hill* and other abortion clinic "buffer zone" cases makes it an unstable foundation upon which to build an expansive redefinition of "captive audience." Furthermore, the significant differences between this case and *Hill* mean that, even if it were consistent with other precedents, it still would not support Petitioner's proposition. This Court's other abortion clinic "buffer zone" decisions, *Madsen v. Women's Health Center*, 512 U.S. 753 (1994) and *Schenck v. Pro-Choice Network of Western New York*, 519 U.S. 357 (1997), also do not support Petitioner's proposed redefinition of "captive audience."

In *Hill*, this Court upheld a statute that imposed criminal penalties upon anyone who, while standing within 100 feet of a health care facility, knowingly approached within eight feet of another person, without their consent, to pass a leaflet or handbill to, display a sign to, or engage in oral protest, education, or counseling. *Hill*, 530 U.S. at 708. The majority found that the statute was a legitimate time, place and manner restriction that was narrowly tailored to meet the State's interest in protecting "unimpeded access to health care facilities and the avoidance of potential trauma to patients associated with confrontational protests." *Id.* at 715. The majority emphasized the state's need to protect the listeners' right to avoid unwanted communication, calling it "an aspect of the broader 'right to be let alone' that one of our wisest Justices characterized as 'the most comprehensive of rights and the right most valued by civilized men.' *Olmstead v. United States*, 277 U.S. 438, 478, 72 L. Ed. 944, 48 S. Ct. 564 (1928) (Brandeis, J., dissenting)."

Id. at 716-717. The majority acknowledged that "'[t]he right to avoid unwelcome speech has special force in the privacy of the home . . . and its immediate surroundings," and concluded that it should apply with similar force to entrances to health care facilities. *Id.* (citing *Rowan*, 397 U.S. at 738, and *Frisby*, 487 U.S. at 485).

In his dissent, Justice Scalia argued that the majority had departed significantly from prior precedent. *Id.* at 751. He criticized the majority's reliance upon what he called "a bon mot in a 1928 dissent," and went on to note that the "right to be let alone" identified in that dissent actually contradicted the majority's position. *Id.* "The right to be let alone that Justice Brandeis identified was a right the Constitution 'conferred, as against the government'; it was that right, not some generalized 'common-law right' or 'interest' to be free from hearing the unwanted opinions of one's fellow citizens, which he called the 'most comprehensive' and 'most valued by civilized men.'" *Id.* "To the extent that there can be gleaned from our cases a "right to be let alone' in the sense that Justice Brandeis intended, it is the right of the speaker in the public forum to be free from government interference of the sort Colorado has imposed here." *Id.* "In any event, the Court's attempt to disguise the 'right to be let alone' as a 'governmental interest in protecting the right to be let alone' is unavailing for the simple reason that this is not an interest that may be legitimately weighed against the speakers' First Amendment rights (which the Court demotes to the status of First Amendment 'interests.')" *Id.* In a statement particularly apropos to this case, Justice Scalia said, "We have consistently held that 'the Constitution does not permit the government to decide which types of otherwise protected speech are sufficiently offensive to require protection for the unwilling listener or viewer.'" *Id.* (citing *Erznoznik*, 422 U.S. at 210). Justice Scalia further noted that the majority's decision contradicted its opinion in *Schenck*, in which it reiterated that "'as a general matter, we have indicated that in public debate our own citizens must tolerate insulting, and even outrageous, speech in order to provide adequate breathing space to the freedoms protected by the First Amendment.'" *Id.* at 752 (citing *Schenck,* 519 U.S. at 383).

The shortcomings highlighted by Justice Scalia demonstrate why *Hill* cannot be used to support Petitioner's proposed expansion of the "captive audience" doctrine. *Hill* places public rights of way within a 100 foot radius of the entrance to a health care facility in the same category as a personal residence, and grants greater protection to those entering a health care facility for elective procedures than is afforded to those entering a courthouse to comply with a summons or students on public school campuses. *See Cohen*, 403 U.S. at 21; *Tinker*, 393 U.S. at 512. Notably, *Hill* did not address protecting patients in a hospital seeking treatment from intrusive conduct, but granted people walking within 100 feet of a health care facility the power to censor others' First Amendment rights if they do not like the message. *Hill* improperly redefined a citizens' right to be left alone from government interference with his First Amendment rights as a listener's right to be left alone from hearing unpopular messages, and then placed that redefined "right" above the First Amendment rights of the speaker. That improper balancing of a common law concept against a fundamental First Amendment right is not a proper basis for expanding the "captive audience" doctrine as suggested by Petitioner and his amici, and may be best understood as an "abortion distortion" case.

Furthermore, even if *Hill* did not represent a departure from this Court's precedents, it still would not support Petitioner's proposed expansion of the "captive audience" doctrine. The statute in *Hill* was enacted to prevent someone from coming within eight feet of another person without their permission and thereby impending access to a health care provider. *Hill*, 530 U.S. at 708. The state based the law upon its duty to protect the health, safety and welfare of its citizens by preventing trauma associated with confrontations while trying to obtain medical care. *Id.* at 715. Here, the civil fines imposed had nothing to do with the health, safety and welfare of patients seeking health care, but to punish the Phelpses for passively displaying objectionable messages in the vicinity of a funeral. There was no threatened or actual impediment to the memorial service, nor any confrontation which could have caused trauma. The protest was not within 100 feet of a health care facility, nor even of the funeral site, and there was no attempt to approach any of the funeral goers. Consequently, even if there were valid state interests underlying the statute in *Hill*, those interests are not present in this case and cannot support Petitioner's proposed expansion of the "captive audience" doctrine.

This Court's other abortion clinic "buffer zone" cases also do not support Petitioner's proposed expansion of the "captive audience" doctrine. *Madsen* 512 U.S. 753; *Schenck*, 519 U.S. 357. In *Madsen* this Court invalidated provisions of an injunction which established a 36-foot buffer zone on private property, banned observable images, established a 300-foot no-approach zone around an abortion clinic, and established a 300-foot buffer zone around staff residences. *Madsen*, 512 U.S. at 773-775. While this Court generally agreed with the Florida Supreme Court that clinic patients could be said to be "held captive by medical circumstance," it refused to go as far as the state court did in restricting speech. *Id.* In particular, this Court found that the prohibition on "images observable" to patients in the clinic impermissibly burdened more speech than necessary to protect the state's purported interests in protecting patients from threats or preventing anxiety. *Id.* at 773. "The only plausible reason a patient would be bothered by 'images observable' inside the clinic would be if the patient found the expression contained in such images disagreeable." *Id.* "But it is much easier for the clinic to pull its curtains than for a patient to stop up her ears, and no more is required to avoid seeing placards through the windows of the clinic." *Id.* Similarly, "the 300 foot zone around the residences in this case is much larger than the zone provided for in the ordinance which we approved in *Frisby*," where the prohibition was limited to 'focused picketing taking place solely in front of a particular residence.'" *Id.* at 775. Therefore, even in the home, where an individual's privacy interest is at its absolute peak, even a 300-foot "buffer zone" against unwelcome speech is too broad. *See id.* Since the Phelpses were more than three times that distance from the funeral, the restriction supported by Petitioner and his amici would be impermissible, even if the funeral service could be analogized to a private residence (which it cannot). Furthermore, as was true with the images on the placards in *Madsen,* the images on the Phelpses' signs did not threaten funeral goers, so there is no legitimate basis for prohibiting their display. This is particularly true in light of the fact that the images could not be seen by funeral goers and therefore could not cause anxiety or distress. Consequently, as this Court said in *Madsen,* the only plausible reason that Petitioner would be bothered by the images on the Phelpses' signs is that he found the expression disagreeable. As this Court has emphasized, that does not justify restricting First Amendment rights. *Cohen,* 403 U.S. at 21.

In *Schenck,* the Court invalidated provisions creating "floating buffer zones," which banned demonstrations within 15 feet of any person or vehicle seeking access to or leaving the clinics. *Schenck,* 519 U.S. at 362. The clinics at issue in *Schenck* had been subjected to numerous large-scale blockades in which protestors marched, stood, kneeled, sat or lay in parking lots, driveways, and doorways and blocked patients and staff from entering the clinics. *Id.* The lower court also identified problems with threatening, face-to-face confrontations between demonstrators and clinic patients. *Id.* The lower court enacted restrictions based upon a stated interest in ensuring unimpeded access to the clinics and prohibiting threatening face-to-face confrontations. *Id.* While this Court upheld some of the restrictions as narrowly tailored to serve those interests, it invalidated the floating buffer zones because they restricted more speech than was necessary to prevent intimidation and to ensure access to the clinics. *Id.* at 377. "The floating buffer zones prevent defendants...from communicating a message from a normal conversational distance or handing leaflets to people entering or leaving the clinics who are walking on the public sidewalks." *Id.* The expansive "captive audience" doctrine proposed by Petitioner would invade even more First Amendment rights in that it would sanction passive demonstrations not merely outside normal conversational distance, but outside the sight or hearing of people attending a funeral. This would constitute an unprecedented expansion of the "captive audience" doctrine, going beyond even what is permitted when the privacy of a personal residence is involved.

This Court should reject Petitioner's and his amici's proposal for this unprecedented and unjustified expansion of the "captive audience" doctrine, particularly in light of the facts of this case. The ramifications of their proposal are potentially frightening.

III. EXPANDING THE "CAPTIVE AUDIENCE" DOCTRINE AS PROPOSED BY PETITIONER WOULD UNDERMINE THE FIRST AMENDMENT.

Broadening the concept of "captive audience" as Petitioner and his amici propose threatens the very foundation upon which the First Amendment was built. This Court has long recognized that "a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger." *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949). "Robust debate" and "inviting dispute" are among the core foundations of the First Amendment. *New York Times Co. v. Sullivan,* 376 U.S. 254, 270 (1964).

> Those who won our independence believed ... that public discussion is a political duty; and that this

> should be a fundamental principle of the American government. They recognized the risks to which all human institutions are subject. But they knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law–the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed.'

Id. (citing *Whitney v. California*, 274 U.S. 357, 375-376 (1927) (Brandeis, J., concurring). The First Amendment, therefore, reflects "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *Id.* "As a general matter, we have indicated that in public debate our own citizens must tolerate insulting, and even outrageous, speech in order to provide 'adequate breathing space' to the freedoms protected by the First Amendment.'" *Boos v. Barry*, 485 U.S. 312, 322 (1988). Adopting Petitioner's view of the "captive audience" doctrine would significantly undermine that foundation. Instead of providing "adequate breathing space to the freedoms protected by the First Amendment," the First Amendment may be left gasping for air. *Boos*, 485 U.S. at 322.

The VFW's amicus brief cogently illustrates the point. According to the VFW, "[t]he right of a family to be let alone during a loved one's funeral supersedes any First Amendment protection afforded to Respondents' speech." (VFW Brief, p. 10). "Respondents' speech warrants little, if any First Amendment protection. 'Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution.'" (VFW Brief,

p. 6, n5) (quoting *Chaplinsky v. State of New Hampshire,* 315 U.S. 568, 572 (1942) (quoting *Cantwell v. Connecticut,* 310 U.S. 296, 309-10 (1940)). The expansive nature of Petitioner and his amici's proposed definition of "captive audience" and how it threatens the concept of "inviting dispute" is illustrated in the following: "In addition to the personal attacks, it is the very presence of protesters, independently of their words, that is disruptive." (VFW Brief at 9, n.8). If the mere presence of protestors can trigger restrictions on free speech, then the First Amendment will become little more than a hollow shell. Under Petitioner's proposal, any time anyone perceives that there is someone nearby who might say something offensive, then the listener will be able to severely limit or even shut down the speech, even if nothing is uttered or displayed. For example, if one group sponsoring an event in one portion of a park found out that there was a gathering of people with whom they disagreed on the other side of the park, out of ear shot and out of sight, then the former group could severely limit or even prohibit the latter group's activity. It would not be necessary for the former group to hear the message or see the latter group speaking. It would be sufficient if the former group merely knew the latter group were there and believed that the message was offensive. This would be prior restraint at its worst.

Indeed, under amici's proposal, the American Revolution itself would never have occurred, since the mere existence of the Founders and their message would have been offensive to those loyal to Great Britain and therefore subject to sanction. Petitioner and his amici propose a dangerous subjective analysis of free speech rights based upon what some third party believes is appropriate. This proposed expansion of the concept of "captive audience" would all but eliminate the idea of "robust debate" and would encourage widespread restrictions upon activities seen as offensive to some particular group or person. The possibility of civil fines, or, as in this case, money damages in the millions of dollars would chill First Amendment activities in an unprecedented manner. This Court should not sanction such an attack on core First Amendment freedoms.

CONCLUSION

This Court should reject Petitioner's and his amici's proposed assault upon the First

Amendment and decline their invitation to redefine the "captive audience" doctrine.

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ALBERT SNYDER,
Petitioner,
v.
FRED W. PHELPS, SR. ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF SENATORS HARRY REID, MITCH MCCONNELL, AND 40 OTHER MEMBERS OF THE U.S. SENATE AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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BRIEF OF SENATORS HARRY REID, MITCH MCCONNELL, AND 40 OTHER MEMBERS OF THE U.S. SENATE AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

Amici curiae respectfully submit this brief in support of petitioner.[1]

INTERESTS OF *AMICI CURIAE*

Amici are Senate Majority Leader Harry Reid, Senate Minority Leader Mitch McConnell, and Senators John Barrasso, Robert F. Bennett, Barbara Boxer, Sherrod Brown, Sam Brownback, Richard Burr, Roland W. Burris, Benjamin L. Cardin, Thomas R. Carper, Robert P. Casey, Jr., Susan M. Collins, Kent Conrad, Mike Crapo, Byron L. Dorgan, Dianne Feinstein, Al Franken, Kirsten E. Gillibrand, Chuck Grassley, Mike Johanns, Tim Johnson, John Kerry, Amy Klobuchar, George S. LeMieux, Blanche L. Lincoln, Claire McCaskill, Jeff Merkley, Barbara A. Mikulski, Patty Murray, Bill Nelson, Jack Reed, James E. Risch, Pat Roberts, John D. Rockefeller IV, Charles E. Schumer, Arlen Specter, Debbie Stabenow, Mark Udall, David Vitter, Sheldon Whitehouse, and Ron Wyden.

As national leaders, *amici* support the members of our armed forces, our veterans who have served their country, and our families who have lost loved ones in the line of duty. "There is no greater calling than to defend our nation in the armed services," and "we must never forget the contributions" that the members of our armed forces "have made to protect our way of life." Harry Reid, Statement on National Security, http://reid.senate.gov/issues/defense.cfm (last visited May 27, 2010).

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[1] Pursuant to Rule 37.6, counsel for *amici curiae* state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission. The parties received timely notice of *amici's* intent to file this brief. All parties have consented to its filing, and letters reflecting their consent have been filed with the Clerk.

As Members of Congress, *amici* are entrusted by the American people to support the military service members charged with the defense of our nation and to ensure that those slain in service are lain to rest with dignity, solemnity, and respect. Military service members have fought to protect the freedoms and rights enshrined by the United States Constitution and enjoyed by the American people, including protections of public expression. *Amici* believe that it is their role as Members of Congress to provide for the safety and superiority of the United States military and the well-being of its personnel and their families, consistent with the rights and freedoms they fight to protect.

Congress has a long tradition of supporting the families of fallen soldiers. It has provided a number of financial and other tangible benefits to families of soldiers killed in war. *See, e.g.*, 10 U.S.C. §§ 1475-1480 (immediate cash payments); 38 U.S.C. §§ 1965 et seq. (enrollment in the Servicemembers' Group Life Insurance program, which provides a lump sum payment in the event of death); 10 U.S.C. §§ 1447 et seq. (guarantees of long-term income through the Veterans Affairs Dependency and Indemnity Compensation and the Survivor Benefit Plan); 37 U.S.C. § 403(*l*) (housing benefits); 10 U.S.C. §§ 1071 et seq. (health care benefits); and 38 U.S.C. ch. 35 (educational assistance programs). Federal laws also provide families of deceased service members with ceremonial burial honors, including the funeral director's services, the preparation and transportation of the deceased, the folding and presentation of a United States flag to the veteran's family, and the playing of Taps, at no cost to the family. 10 U.S.C. §§ 1491(c), 1482(a). And Congress recently enacted laws to regulate the time, place, and manner of demonstrations on federal cemeteries and at military funerals, reflecting Congress's strong interest in preserving the sanctity and privacy of these funerals. *See* 38 U.S.C. § 2413(a)(1); 18 U.S.C. § 1388.

Amici file this brief because they believe that the law should continue to protect, as it long has, the rights of all private persons—including the families of fallen soldiers—to mourn their loved ones at a peaceful and solemn funeral.

STATEMENT

A jury found that respondents deprived the parents of Marine Lance Corporal Matthew A. Snyder of a peaceful and solemn opportunity to bury their son. Matthew Snyder was killed in Iraq in 2006 in the line of duty. His family organized a private funeral for him at St. John's Catholic Church in his hometown of Westminster, Maryland. Members of the Westboro Baptist Church in Topeka, Kansas, including the church's pastor Fred W. Phelps and his daughters, learned of the time and place of Matthew's funeral and planned a protest there, as they have done at other funerals of fallen soldiers around the country. The demonstrators displayed signs with messages such as "Semper fi fags" and "Thank God for dead soldiers" and then created a web video about Matthew's funeral memorializing their protest. Petitioner, Matthew's father Albert Snyder, sued the Phelps family and their church and won a jury verdict on three state torts: intentional infliction of emotional distress, intrusion upon seclusion, and civil conspiracy. The U.S. Court of Appeals for the Fourth Circuit overturned the jury verdict, concluding that the First Amendment protected respondents' speech and conduct from any state law tort liability. This Court granted a petition for certiorari.

SUMMARY OF ARGUMENT

In our nation, as in nearly every culture and religious tradition, proper burials play a crucial role in helping the bereaved mourn the dead. The disruption of a funeral interferes with the necessary emotional process of grieving, and thus can inflict severe psychological and even physical distress on the bereaved. In recognition of the vulnerability of mourners, American courts have long recognized a "right" to a decent burial.

In recent years, Congress and forty-six state legislatures have enacted laws to minimize picketing and other forms of disruptive activity in or near cemeteries during a funeral. Those laws are not challenged here, but they evidence the significant governmental interest in protecting the dignity of private funerals. These content-neutral, narrowly-tailored laws permit families to ensure that their rites remain private and solemn, and do not become a vehicle for the expression of disruptive or contrary views by some other person.

State tort laws supplement these funeral picketing regulations in deterring harmful conduct at private funerals and protecting the rights of mourners to express their own private messages of grief and tribute. In this case, a jury found respondents liable for three Maryland torts, including intentional infliction of emotional distress ("IIED") and invasion of privacy by intrusion upon seclusion. The court of appeals incorrectly assumed that those torts protect essentially the same broad interests as defamation claims, and thus must be subject to the same specific constitutional limitations that constrain defamation claims against public figures. But the torts are not the same. As applied here, the IIED and intrusion upon seclusion torts narrowly protect against willful efforts to invade a private grieving ceremony and to inflict harms on those involved. The right to speak freely about matters of public concern does not encompass insults and verbal abuse intended to invade a private memorial ceremony and injure its participants. Respondents were and are free to convey their repugnant message in virtually any public manner they choose. But they were not free to hijack petitioners' private funeral as a vehicle for expression of their own hate.

Amici are fully committed to "the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). Statutes and common-law torts that protect the rights of private families to mourn their dead in their own way do not undermine that principle. This Court should reject the court of appeals' contrary assumption.

ARGUMENT

A. Solemn And Dignified Funerals Play A Significant Role In American Life And Law

1. "Burial rites or their counterparts have been respected in almost all civilizations from time immemorial." *Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, 167-70 (2004). Ordered and dignified funeral rites play a special role in nearly all religious traditions. *See* Lewis R. Aiken, *Dying, Death, and Bereavement* 125-50 (2001). And "[t]here is no group, however primitive at one extreme or civilized at the other, which left freely to itself and within its means does not dispose of the bodies of its members with ceremony." Robert W. Habenstein & William M. Lamers, *Funeral Customs the World Over* 757 (1963). These funeral rituals in every society serve to "reinvoke past emotion, to bind the individual to his own past experience, and to bring the members of the group together in a shared experience." Margaret Mead, *Twentieth Century Faith, Hope and Survival* 124-27 (1972), *quoted in* Roy Vaughn Nichols, *Acute Grief, Disposal, Funerals and Consequences, in Grief and the Meaning of the Funeral* 39 (Otto S. Margolis et al. eds., 1975).

Funerals help families and communities cope with their loss and celebrate the life of the deceased in several ways. "They are a sign of the respect a society shows for the deceased and for the surviving family members." *Favish*, 541 U.S. at 168. They "affir[m] the power of human society to transcend the death of an individual and conquer death itself." Stella Mary O'Gorman, *Death & Dying in Contemporary Society: An Evaluation of Current Attitudes and*

Rituals, 27 J. Advanced Nursing 1127, 1132 (1998). They help to "move us from chaos and disorder to meaning and order [and] help frame our loved one's death into a larger picture." Christine S. Davis, *A Funeral Liturgy: Death Rituals as Symbolic Communication*, 13 J. Loss & Trauma 406, 414 (2008). And they have "the effect of drawing a social support network close to the bereaved family shortly after the loss has occurred, [which] can be extremely helpful in the facilitation of grief." J. William Worden, *Grief Counseling and Grief Therapy: A Handbook for the Mental Health Practitioner* 79 (3d ed. 2003).

When funerals and burial rites are disrupted, it interferes with the family's process of grieving and healing. The death of a loved one places great strains on the bereaved, affecting their emotions, often their finances, and even their physical health. *See, e.g.*, Margaret Stroebe et al., *Health Outcomes of Bereavement*, 370 Lancet 1960 (2007) (reviewing recent studies and concluding that there is an increased risk of mortality and physical and psychological ill-health in the bereaved). And families of young men and women killed in combat are particularly vulnerable to emotional distress. *See* Worden, *supra*, at 40 (noting complications in the grieving process caused by sudden deaths, avoidable deaths, and violent deaths).

2. In respect for the deceased and their mourners, American courts have repeatedly described a "right" to a peaceful funeral. "There is a right to a decent burial, and that right is guarded by the law." 22A Am. Jur. 2d *Dead Bodies* § 13. As the Wisconsin Supreme Court explained: "We can imagine no clearer or dearer right in the gamut of civil liberty and security than to bury our dead in peace and un-

obstructed; none more sacred to the individual, nor more important of preservation and protection from the point of view of public welfare and decency; certainly none where the law need less hesitate to impose upon a willful violator responsibility for the uttermost consequences of his act." *Koerber v. Patek*, 102 N.W. 40, 43 (Wis. 1905); *see also Holland v. Metalious*, 198 A.2d 654, 656 (N.H. 1964) ("The right to 'decent' burial is one which has long been recognized at common law, and in which the public as well as the individual has an interest"); *King v. Elrod*, 268 S.W.2d 103, 105 (Tenn. 1953) ("It is universally recognized that the sentiment of mankind, the right to decent burial is well guarded by the law, and relatives of a deceased are entitled to insist upon legal protection for any disturbance or violation of this right." (citation omitted)).

The right to a decent burial manifests itself in the law in different ways. One is the existence of a special category within the common law tort of negligent infliction of emotional distress for interference with proper burials. "An actor whose negligent conduct causes serious emotional disturbance to another is subject to liability" in only two limited contexts, one of which developed out of conduct related to death and burials. Restatement (Third) Torts § 46 (Tentative Draft No. 5 2007). That principle arose as an "exception[] to the general rule that an actor is not liable for negligent conduct that causes only emotional harm." *Id.* cmt b. Because actions related to burials are "fraught with the risk of emotional disturbance," "courts have imposed liability on hospitals and funeral homes" for negligent actions with respect to dead bodies and mourners. *Id.*; *see, e.g.*, *Hoard v. Shawnee Mission Med. Ctr.*, 662 P.2d 1214, 1220 (Kan. 1983); *Brown v. Matthews Mortuary*, 801 P.2d 37, 43-44 (Idaho 1990); *Blackwell v. Dykes Funeral Homes, Inc.*, 771 N.E.2d 692, 696-97 (Ind. Ct. App. 2002). "What all these cases appear to have in common is an especial likelihood of genuine and serious mental distress, arising from the special circumstances, which serves as a guarantee that the claim is not spurious." W. Page Keeton, *Prosser and Keeton on Torts* § 54 (5th ed. 1984). These cases permit tort liability without intentional conduct or bodily harm because the bereaved are particularly susceptible to severe emotional distress. *See Quesada v. Oak Hill Improvement Co.*, 261 Cal. Rptr. 769, 778 (Cal. Ct. App. 1989) ("Few among us who have felt the sting of death cannot appreciate the grief of those bereaved by the loss"); *Lamm v. Shingleton*, 55 S.E.2d 810, 813 (N.C. 1949) ("[t]he tenderest feelings of the human heart center around the remains of the dead").

This Court's FOIA jurisprudence provides another example of the weight accorded to a family's interest in private grieving. In *Favish*, this Court held that the term "personal privacy" in FOIA Exemption 7(C) "recognizes surviving family members' right to personal privacy with respect to their close relative's death-scene images." 541 U.S. at 170. In reaching this conclusion, the Court observed that the family's privacy interest in this context has "dee[p] roots" in the common law tradition. Pursuant to this tradition, "[f]amily members have a personal stake in honoring and mourning their dead and objecting to unwarranted public exploitation that, by intruding upon their own grief, tends to degrade the rites and respect they seek to accord to the deceased person who was once their own." *Id.* at 168.

B. The Federal Government And Most States Have Enacted Statutes To Protect Mourners From Disruptive Protests At Private Funerals

Reflecting the strong public interest in preserving the solemnity of private funerals, in recent years the federal government and forty-six states have enacted laws that regulate picketing and other forms of disruptive activity on or near cemeteries during a funeral. *See* Stephen R. McAllister, ***Funeral Picketing Laws and Free Speech***, 55 Kan. L. Rev. 575, 579-83, 614 (2007) (collecting cites); Conn. Ann. Stat. § 53a-183c; N.H. Rev. Stat. Ann. § 644:2-b. These constitutional time, place, and manner regulations protect private families while leaving open ample alternative channels for public protest and political debate. Although respondents do not challenge the constitutionality of those statutes, the laws demonstrate the significance of the governmental interest in protecting the dignity of private funerals, and *amici* urge the Court to ensure that its resolution of this case casts no doubt on the validity of these laws.

1. Congress has recently enacted two different statutes to protect funeral attendees from unwanted disruptions. The first, the Respect for America's Fallen Heroes Act, prohibits demonstrations on cemeteries under control of the National Cemetery Administration and at Arlington National Cemetery without the approval of the superintendent or director of the cemetery. 38 U.S.C. § 2413(a)(1). In addition, for an hour before and after a funeral or memorial service, the Act prohibits demonstrations that are either (1) within 150 feet of a road or route of ingress or egress from the property and include an individual "willfully making or assisting in the making

of any noise or diversion" that disturbs the peace or good order of the funeral, service or ceremony or (2) within 300 feet of the cemetery and impede access to or egress from the cemetery. *Id.* § 2413(a)(2). A second statute, the Respect for the Funerals of Fallen Heroes Act, extends these time and place restrictions to any activity, not just demonstrations, that disturbs or impedes access to "any funeral of a member or former member of the Armed Forces," including those at cemeteries not under federal control. 18 U.S.C. § 1388. Persons who violate these regulations are subjected to fine, imprisonment for not more than one year, or both. *Id.* §§ 1387, 1388(b).

Congress also enacted a "sense of Congress" provision recommending that "each State should enact legislation to restrict demonstrations near any military funeral." Pub. L. No. 109-228, § 4, 120 Stat. 387, 389 (2006). With that encouragement, many states enacted similar laws regulating disruptive activities near the funeral of any individual. Like the federal law, most of these state statutes prohibit protesting and other demonstrations within a certain distance from the funeral for a period of time, usually one hour, before and after the ceremony. *See* McAllister, *supra*, at 580. The protected "buffer" zones around the funeral vary in distance from 100 to 1000 feet, though most laws cover distances between 300 and 500 feet. *Id.* A few states protect funeral attendees by prohibiting activities that disturb the peace without delineating a specific protected buffer zone, and several other states include provisions prohibiting both disruptions of the peace and certain activity within a buffer zone. *Id.* at 580-81.

The statute in Maryland—the state in which petitioner's son's funeral occurred—is illustrative of both types of statutory restrictions. Maryland prohibits a person from engaging in "picketing activity within 100 feet of a funeral, burial, memorial service, or funeral procession that is targeted at one or more persons attending the funeral, burial, memorial service, or funeral procession." Md. Code. Ann., Crim. Law § 10-205(c). The Maryland law also restricts individuals from "address[ing] speech to a person attending a funeral, burial, memorial service or funeral procession that is likely to incite or produce an imminent breach of the peace." *Id.* § 10-205(b).

2. These funeral picketing statutes were carefully crafted to respect and comply with the First Amendment.[3] Laws governing the time, place, and

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[3] The original bill was amended in light of constitutional concerns, *see* S. 4187, 109th Cong. (2006); 152 Cong. Rec. S5129 (daily ed. May 24, 2006) (statement of Senator Craig introducing amended version of bill), and the legislative history is replete with discussion of how the law is constitutional, *see, e.g.*, *Hearing on H.R. 5037 Before the Subcomm. on Disability Assistance and Mem'l Affairs of the H. Comm. on Veteran's Affairs* ("H.R. 5037 Hearing"), 109th Cong. 7-8 (2006) (statement by Representative Chabot of Ohio on constitutionality of restrictions, which are content-neutral); 152 Cong. Rec. H2199, H2202 (daily ed. May 9, 2006) (statement of Representative Buyer of Indiana on constitutionality of the time, place and manner restrictions); H.R. 5037 Hearing at 122-23 (testimony of Prof. David Forte at Cleveland-Marshal College of Law, Cleveland State University on constitutional authority of federal government to regulate cemeteries); 152 Cong. Rec. S5129 (statement by Senator Craig of Idaho, noting that the drafters of the House bill "went to great lengths to carefully craft the [] legislation to preserve the dignity of military funerals while at the same time balancing first amendment rights"); 152 Cong. Rec. H9198, 9199 (daily ed. Dec. 8, 2006) (statement of Rep. Cannon of Utah explaining that the "bill is modeled after an ordinance upheld

manner of speech—even in a public forum—are permissible so long as the restrictions: (a) serve a significant governmental interest; (b) are narrowly tailored; and (c) "leave open ample alternative channels for communication of the information." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (quoting *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984)). The funeral picketing statutes satisfy these criteria.[3]

a. The funeral protection laws are content neutral; that is, the statutes do not discriminate based on the subject of the speech or viewpoint of the speaker. Instead, these laws prohibit all speech within a certain time and distance from the funeral, or prohibit all speech that is likely to cause a disruption or incite a breach of peace. This Court has found similarly phrased laws to be content neutral, *see, e.g.*, *Grayned v. City of Rockford*, 408 U.S. 104, 108, 113 (1972) (finding that a law prohibiting "noise or diversion which disturbs or tends to disturb the peace or good order" did not "permit punishment for

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by the Supreme Court as a constitutional time, place, and manner restriction").

[3] The requirement for superintendent or director approval for demonstrations on property controlled by the National Cemetery Administration and Arlington National Cemetery is facially valid under a different doctrine. These cemetery lands are nonpublic fora. *See Griffin v. Sec'y of Veterans Affairs*, 288 F.3d 1309, 1319-22 (Fed. Cir. 2002); *Phelps-Roper v. Nixon*, 545 F.3d 685, 691 (8th Cir. 2008), *cert. denied*, 129 S. Ct. 2865 (2009); *cf. Greer v. Spock*, 424 U.S. 828, 831 (1976) (military bases are nonpublic fora). Government may exercise discretion to regulate speech on nonpublic fora so long as the regulations are reasonable and viewpoint neutral. *See Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983). That is plainly the case here.

the expression of an unpopular point of view"), and courts of appeals have specifically classified funeral picketing laws as content-neutral, *see Nixon*, 545 F.3d at 690-91 (Missouri); *Phelps-Roper v. Strickland*, 539 F.3d 356, 361 (6th Cir. 2008) (Kansas).

b. The restrictions on picketing near cemeteries and funerals further an important governmental interest. As described above, *supra* Section A, states have an important interest in safeguarding the ability of a captive audience of grieving families to participate in funerals in a peaceful and solemn manner. This Court has recognized the state's strong interest in protecting citizens from unwanted communication in similar circumstances. In *Frisby v. Shultz*, the Court upheld a ban on residential picketing in order to protect "residential privacy." 487 U.S. 474, 482-84 (1988). Emphasizing the captive audience within a home and the long-standing right of privacy enjoyed by citizens within their own walls, this Court reasoned that "[a]lthough in many locations[] we expect individuals simply to avoid speech they do not want to hear, the home is different." *Id.* (citation omitted). This Court has extended that reasoning to protect individuals entering a health care facility, because it has long recognized the interest of protecting "unwilling listeners in situations where the degree of captivity makes it impractical for the unwilling viewer or auditor to avoid exposure." *Hill v. Colorado*, 530 U.S. 703, 718 (2000) (quotation omitted). Regulations on speech near the medical facilities were reasonable in light of the "particularly vulnerable physical and emotional conditions" of those entering the facilities. *Id.* at 729.

Like individuals in their home or those entering a medical facility, private individuals attending a funeral become "unwilling listeners" subject to a "degree of captivity" that "makes it impractical" to avoid exposure. A funeral almost by definition occurs at a specific place and time, and cannot simply be relocated to avoid unwanted intrusions. In addition, the bereaved at a funeral are physically and emotionally vulnerable. If a funeral is disrupted, the cathartic effect of the ceremony on the family may be irretrievably lost. There is no opportunity for a "do-over."

c. The funeral protection laws are narrowly tailored and leave open alternative channels of communication. In *Hill v. Colorado,* this Court explained that "[w]hen a content-neutral regulation does not entirely foreclose any means of communication, it may satisfy the tailoring requirement even though it is not the least restrictive or least intrusive means of serving the statutory goal." 530 U.S. at 726. *Frisby* similarly upheld a restriction on residential picketing because it still allowed for demonstrations that targeted a broader audience than a single home. 487 U.S. at 483; *id.* at 486-88 ("A complete ban can be narrowly tailored, but only if each activity within the proscription's scope is an appropriately targeted evil.").

The funeral protection laws address only that speech that disrupts a funeral. The statutes only prohibit speech for a limited period of time—from an hour before to an hour after the funeral or service. The laws thus simply allow funeral participants to conduct their ceremony without disruption; they do not preclude the ability of non-participants to express their messages in a different time, place, and manner. In that respect, these laws are even narrower than those upheld in *Frisby* and *Hill,* which applied at all times, even when a person was not home or the medical facility was not open. Similarly, the buffer zones in the funeral protection laws only restrict speech in designated areas in which the speech could disrupt the funeral. To the extent that the buffer zones in some state funeral protection laws are larger than those that have been previously upheld, that difference reflects the characteristics of the place and activity the government seeks to protect. *See Hill*, 530 U.S. at 728 (explaining that in determining whether a restriction is narrowly tailored, "[w]e must, of course, take account of the place to which the regulations apply"). Funerals are often held out of doors at a burial plot and involve large number of attendees; requiring a correspondingly larger buffer zone than those necessary to protect single individuals entering and remaining inside a facility. *See Strickland*, 539 F.3d at 371.

Because the statutes are narrowly tailored to protect funerals, they leave open ample alternative channels for demonstrations. Demonstrators may express their message whenever and wherever they wish, outside the limited temporal and geographic boundaries set by the statutes.

The funeral protection laws, in short, do not infringe speech rights; they instead protect long-recognized rights of private mourners to a peaceful memorial service. This Court should not address respondents' challenge to the tort verdict below in any way that calls into question these widespread and important statutory protections for the rights of families burying their loved ones.

C. The Court Of Appeals Erred In Treating Emotional Distress And Intrusion On Seclusion Torts, As Applied To A Private Funeral, As Equivalent To Defamation Claims Against Public Figures

The statutory funeral protections described above are not the only constitutional means by which states may protect the rights of private mourners at private funerals. State tort laws also protect families at funerals from willful efforts to intrude upon the private ceremony and to inflict harm on their participants. In this case, respondents were held liable for three torts: intentional infliction of emotional distress ("IIED"); invasion of privacy by intrusion upon seclusion; and a civil conspiracy claim based on these two.

The court of appeals vacated the jury verdict because it concluded that respondents' conduct was categorically protected from liability under any tort. In so doing, the court assumed that the specific constitutional constraints articulated by this Court for *defamation* claims applied to the distinct torts of IIED and intrusion upon seclusion, even when brought by a private figure. The Fourth Circuit's analysis misconstrues the nature of the latter torts and the important governmental interests underlying them. When IIED and intrusion upon seclusion claims are asserted by private plaintiffs—and especially when they arise out of the funeral context long accorded special protection in U.S. jurisprudence—they should not be treated the same for constitutional purposes as defamation claims asserted by public figures.

1. This Court's decisions in *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988); *Time, Inc. v. Hill*, 385 U.S. 374 (1967); and *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), establish that constitutional constraints developed for one state tort cannot be assumed to automatically apply to others, and that the constraints applicable to claims by public figures and officials are not necessarily applicable to private plaintiffs.

In *Falwell*, this Court examined the extent to which the First Amendment limits IIED claims brought by public figures or officials based on offensive media publications directed at them. The Court previously had identified First Amendment limitations on *defamation* claims against public figures, but the Court expressly rejected a "blind application" of defamation standards to IIED claims. 485 U.S. at 56. The Court instead looked to the specific elements and purposes of the IIED tort. *Id.* "Generally speaking," the Court explained, "the law does not regard the intent to inflict emotional distress as one which should receive much solicitude, and it is quite understandable that most if not all jurisdictions have chosen to make it civilly culpable where the conduct in question is sufficiently 'outrageous.'" 485 U.S. at 53. In "the area of public debate about public figures," however, the Court concluded that the IIED tort had to yield to the interests in public debate protected by the First Amendment. *Id.*[4]

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[4] It was central to the result in *Falwell* that the plaintiff was a public figure. The Court explained that robust political debate "is bound to produce speech that is critical of those who hold public office or ... public figures." *Id.* at 51. The Court thus rejected the view "that a State's interest in protecting *public figures* from emotional distress is sufficient to deny First

In *Time*, the Court likewise emphasized that the *Sullivan* requirements for defamation claims do not automatically apply to a cause of action based on a statutory "right of privacy." 385 U.S. at 390 (rejecting a "blind application" of *Sullivan*). The *Sullivan* principles were a "guide," but the Court carefully considered whether and how those principles apply in the "discrete context" of the right of privacy statute. *Id.* at 390-91. And it confirmed the public figure/private figure distinction drawn in *Falwell*, noting that "a different test might be required in a statutory action by a public official, as opposed to a libel action by a public official or a statutory action by a private individual." *Id.* at 391.

Gertz further confirms that First Amendment restrictions on a tort depend heavily on whether the plaintiff is a private or public figure. There, the Court declined to extend the *Sullivan* actual malice standard to private plaintiffs, because "the state interest in compensating injury to the reputation of private individuals requires that a different rule should obtain with respect to them." 418 U.S. at 343. The Constitution places lesser restrictions on private plaintiff tort claims for two reasons. First, "[p]ublic officials and public figures usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy." 418 U.S. at 344. Thus, "[p]rivate individuals are ... more vulnerable to injury, and the state interest in protecting them is

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Amendment protection to speech that is patently offensive and is intended to inflict emotional injury, even when that speech could not reasonably have been interpreted as stating actual facts about the *public figure* involved." *Id.* (emphases added).

correspondingly greater." *Id.* Second, "[a]n individual who decides to seek governmental office must accept certain necessary consequences of that involvement in public affairs." *Id.* "[N]o such assumption is justified with respect to a private individual," who "relinquished no part of his interest in the protection of his own good name, and consequently he has a more compelling call on the courts for redress of injury inflicted by defamatory falsehood." *Id.* at 345. In light of these distinctions, the Court "conclude[d] that the States should retain substantial latitude in their efforts to enforce a legal remedy for defamatory falsehood injurious to the reputation of a private individual." *Id.* at 345-46.

2. The court of appeals in this case overlooked the lessons of *Falwell*, *Time*, and *Gertz*. The jury found respondents liable for the torts of IIED and intrusion upon seclusion because of respondents' outrageous and inexcusable disruption of petitioners' solemn family memorial service. In reversing that judgment, the Fourth Circuit simply assumed that constitutional constraints applicable to cases involving *defamation* and *public* figures applied equally to *IIED* and *intrusion on privacy* claims brought by *private* plaintiffs. In the Fourth Circuit's view, the First Amendment limitations prescribed by *Sullivan* apply fully "regardless of the specific tort being employed," whenever "a plaintiff seeks damages for reputational, mental, or emotional injury allegedly resulting from the defendant's speech." *Snyder v. Phelps*, 580 F.3d 206, 218 (4th Cir. 2009). The court described *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990)—a defamation case—as a "crucial precedent" holding categorically that all speech is actionable only if it is "susceptible of being proved true or

false." Accordingly, the court held that respondents' abusive verbal conduct could be the subject of tort liability only if it could "reasonably be interpreted as stating actual facts about an individual." 580 F.3d at 218-19. Because respondents' insults did not satisfy that standard, the court concluded, no tort liability could lie. *Id.* at 226.

The court of appeals erred in failing to consider the distinct state interest underlying the torts at issue. And it erred in ignoring the fact that the petitioner is a private individual. The court instead proceeded with the "blind application" of First Amendment limitations this Court has repeatedly condemned. A proper approach to evaluating respondents' speech claim requires careful examination of the interests served by the torts at issue compared to the infringement, if any, on legitimate speech interests asserted by respondents.

3. Viewed properly, the requirements of *Sullivan* and *Milkovich* for defamation claims brought by public figures do not apply to the private plaintiff torts at issue here. Those torts serve different state interests than defamation. They have different elements, govern different activity, and are farther removed from the purposes of the First Amendment, particularly when brought by a private plaintiff.

a. The first tort for which the jury found respondent liable was invasion of privacy by intrusion upon seclusion. "One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person." Restatement (Second) Torts § 652B

(1977). While defamation serves a state's interest in protecting an individual's good name, intrusion protects an individual's privacy. Samuel D. Warren & Louis Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193, 197 (1890) ("The principle on which the law of defamation rests, covers, however, a radically different class of effects from those" of intrusion and related torts). The intrusion tort reflects the state's strong interest in safeguarding the privacy of private families at private funerals. *Supra* Section B (describing statutes that reflect the strong state interest in protecting funerals). When families bury loved ones—including soldiers killed in battle—in a private funeral, they expect a reasonable level of privacy and tranquility, and the state has a strong interest in protecting that expectation.

The First Amendment limitations on defamation claims make little sense for this tort. In contrast to defamation, intrusion is not directed at speech or publication as such. Rather, "[t]he intrusion itself makes the defendant subject to liability, even though there is no publication or other use of any kind of the photograph or information outlined." Restatement (Second) Torts § 652B cmt. b. Because the tort is not targeted at speech specifically, this Court has never held that the First Amendment limits application of the tort, even when verbal conduct is at issue. And when the victim is a private party, the First Amendment interest in facilitating debate on matters of public concerns is especially attenuated, as *Falwell*, *Time*, and *Gertz* recognize. *See supra* at 18-20. In this narrow circumstance, that interest may yield before the strong state interest in protecting the privacy of families mourning their dead against intrusion by those who would celebrate or mock their loss.

b. The second tort for which the jury found respondent liable—IIED—exists to deter and remedy severe emotional distress. *See* Restatement (Second) Torts § 46 (tort available for "extreme and outrageous conduct" that "intentionally or recklessly causes severe emotional distress"). The elements of IIED are particularly amenable to suits based on conduct at a funeral. A graveside mourner is easily susceptible to "severe emotional distress." In addition, the tort's outrage element depends on "the actor's knowledge that the other is peculiarly susceptible to emotional distress," *id.* cmt. f, which is likely to be the case when the act targets a mourner at a funeral. For these reasons, successful emotional distress cases are often based on occurrences at funerals. *See* Restatement (Third) Torts §§ 45, 46 (citing numerous emotional distress cases in the funeral setting)..

IIED differs significantly from defamation, especially when the plaintiff is a private person. Whereas the falsity of the speech is the first element of a defamation claim, *see* Restatement (Second) Torts § 588, falsity has nothing to do with IIED. Just the opposite. IIED requires that the speech be outrageous, which can occur whether or not it is true, but is most likely to occur when it is extreme and hyperbolic. The Fourth Circuit turned this standard on its head—holding that the speech was protected *precisely because* it had the characteristics that make it actionable under IIED.

Further, as explained with respect to the intrusion on privacy tort, the First Amendment interest in public debate has little salience in the context of verbal abuse directed at a private person. Unlike a public official, a private individual has not consciously entered an arena where outrageous attacks are an expected if regrettable weapon. And unlike a public figure, a private plaintiff has no recourse to the public stage to fight back. Accordingly, while the restrictions set forth in *Sullivan* and *Milkovich* are reasonable and necessary to protect the "breathing space" required by the First Amendment for a public figure who seeks the limelight, those constitutional limitations serve no similar purpose when applied to a private IIED plaintiff.

c. The court of appeals failed to consider the important state interests underlying the torts at issue here, particularly when they are brought by private plaintiffs. The point is not that these torts are categorically immune from First Amendment analysis, or that certain limitations are not appropriate if and when necessary to provide "breathing space" for public debate. In fact, the elements of the torts themselves can be construed to avoid infringement of legitimate First Amendment interests. *See Snyder*, 580 F.3d at 227 (Shedd, J., concurring). But whatever speech interest exists in insulting, verbally abusive conduct ought not take categorical precedence over the strong state interest in deterring offensive and disruptive conduct at private family funerals, and in protecting the fundamental legal rights of families to bury and memorialize their loved ones in peace.

CONCLUSION

The decision below should be reversed.

Respectfully submitted,

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May 28, 2010

AMICUS
CURIAE
BRIEF

No. 09-751

IN THE
Supreme Court of the United States

ALBERT SNYDER,
Petitioner.

v.

FRED W. PHELPS, SR., *ET AL.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF *AMICI CURIAE* OF THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS AND TWENTY-ONE NEWS MEDIA ORGANIZATIONS IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*[1]

Amici, described in Appendix A, are twenty-two of the nation's leading news organizations – The Reporters Committee for Freedom of the Press, ALM Media, LLC, The American Society of News Editors, The Associated Press, The Association of American Publishers, Inc., Bloomberg L.P., The Citizen Media Law Project, Dow Jones & Company, Inc., The E.W. Scripps Company, The First Amendment Coalition, The First Amendment Project, The Hearst Corporation, The Media Institute, The National Press Club, The National Press Photographers Association, The New York Times Company, Newspaper Association of America, The Newspaper Guild – CWA, NPR, Inc., The Radio Television Digital News Association, The Society of Professional Journalists, and Tribune Company.

Amici write to make clear that far more is at stake in this case than the ability of the Westboro Baptist Church to protest near military funerals. This case concerns an issue critical to a wide range of speakers, including members of the news media: whether a plaintiff may recover for intrusion and intentional infliction of emotional distress where the harm is based upon the publication of controversial speech about matters of public concern. Because this Court has "consistently rejected the proposition that the institutional press has any constitutional privilege beyond that of other speakers," *Citizens United v. FEC*, 130 S.Ct. 876, 905 (2010) (citing cases), a ruling permitting such recovery threatens to expand dramatically the risk of liability for news media coverage and commentary.

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[1] Both parties have consented to this *amici curiae* brief and letters of consent have been filed with the Clerk. No counsel for a party authored this brief in whole or in part, and no person or entity other than amici and their counsel made a monetary contribution to the preparation or submission of this brief.

Respondents were found liable for millions of dollars in damages for intrusion and intentional infliction of emotional distress based *solely* on their publication of offensive religious and political opinions – opinions which the Petitioner encountered *not* at his son's funeral, but only several hours later by watching news reports, and then weeks later after conducting an online search. *Snyder v. Phelps*, 580 F.3d 206, 212 (4th Cir. 2009) ("*Synder II*"). Imposing tort liability for such speech will chill the activities of all who speak or publish on controversial issues.

Reporters, editorial boards, commentators, authors, and others in the press discuss both public and nonpublic figures in the course of their work. "One need only pick up any newspaper or magazine to comprehend the vast range of published matter which exposes persons to public view, both private citizens and public officials." *Time Inc. v. Hill*, 385 U.S. 374, 388 (1967). Whether it consists of coverage of caustic and emotional debates, a scathing editorial cartoon, a letter to the editor, or an exposé revealing disturbing facts about an individual, the press often must go "beyond the bounds of good taste and conventional manners" in order to perform its constitutionally protected function. *Hustler Mag. v. Falwell*, 485 U.S. 46, 54 (1988) (citation omitted). It can do so *only* because the First Amendment protects expression on matters of public concern, particularly where such statements cannot reasonably be interpreted as stating actual facts about an individual. *Id.* at 50; *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 20 (1990).

INTRODUCTION

Most reasonable people would consider the funeral protests conducted by members of the Westboro Baptist Church to be inexplicable and hateful. Without a doubt, the church's message of intolerance is deeply offensive to many, and especially so to gay Americans, Catholics, veterans, and the families of those who sacrificed their lives defending the United States. But to silence a fringe messenger because of the distastefulness of the message is antithetical to the First Amendment's most basic precepts.

Controversial issues stir public passions. The play *Inherit the Wind*, for example, portrays a community divided over the teaching of evolution in which the Reverend Jeremiah Brown publicly condemns his own daughter for refusing to ostracize the town's science teacher, and preaches at a young boy's funeral that the lad's soul is "damned, writhing in hellfire" because he died without being baptized.[2] To be sure, *Inherit the Wind* is a work of fiction, but *State of Tennessee v. Scopes* – the 1925 "Monkey

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[2] Jerome Lawrence and Robert E. Lee, Inherit the Wind 66-67, 70 (Act II, Scene One; Act II, Scene Two) (Ballantine Books 2007) (1955).

Trial" that inspired it – was quite real, as are the strong emotions it still evokes.

According to the Petitioner, however, "extreme and outrageous statements," like Reverend Brown's fire and brimstone tirades, should lack First Amendment protection if they offend private persons. Those who propagate such views, Petitioner argues, should be subject to damage claims for intentional infliction of emotional distress and intrusion upon seclusion. Petitioner's Brief ("Pet. Br.") at 20. Although the Petitioner raised four separate questions for this Court to consider, this case really turns on one central issue: whether speech on a matter of public concern may be too offensive to merit First Amendment protection.

This case tests the mettle of even the most ardent free speech advocates because the underlying speech is so repugnant. However, the particular facts of this case should not be used to fashion a First Amendment exemption for offensive speech. No less a principle is at stake than the "central tenet of the First Amendment that the government must remain neutral in the marketplace of ideas." *Hustler*, 485 U.S. at 56. As the Court of Appeals understood, "judges defending the Constitution 'must sometimes share [their] foxhole with scoundrels of every sort, but to abandon the post because of the poor company is to sell freedom cheaply. It is a fair summary of history to say that the safeguards of liberty have often been forged in controversies involving not very nice people.'" *Snyder II*, 580 F.3d at 226 (citation omitted). And so it is here.

SUMMARY OF ARGUMENT

The emotional debate surrounding this case has obscured four crucial facts: (1) though Petitioner and his supporting *amici* discuss time, place, and manner restrictions at length, it is undisputed that Respondents obeyed all laws and police instructions regarding the time, place and manner of their protest; (2) Petitioner describes himself as a "captive audience" while at his son's funeral, but it is undisputed that Petitioner encountered the statements underlying his claims only later through the media; (3) Petitioner identifies no state action to support the claim that the protest of the Westboro Baptist Church violated his First Amendment free exercise rights; and (4) the District Court ruled that Respondents' statements were "essentially... religious opinion" rather than statements of fact, a judgment which the Petitioner did not appeal.

Once these issues are clarified, it is evident that the district court verdict is based upon the *content* of Respondents' "religious opinion." There is thus no way Respondents could have avoided liability short of altering the content of their speech. The First Amendment does not permit such a Hobson's choice. To the contrary, it protects the "prized American privilege to speak one's mind, although not always with perfect good taste, on all public (issues)." *New York Times v. Sullivan*, 376 U.S. 254, 269 (1964) (citations omitted).

It may be tempting to search for exceptions to this rule when faced with speech as troubling as the church's funeral protest and "epic poem." But courts consistently have resisted this temptation no matter how offensive or seemingly trivial the speech, like *Hustler Magazines's* parody depicting evangelist Jerry Falwell having sex with his mother in an outhouse or the spectacle of neo-Nazis marching among Holocaust survivors in Skokie, Illinois. We accept such excesses because they are inseparable from the First Amendment's essential purpose, for "[w]ithout the right to stand against society's most strongly-held convictions, the marketplace of ideas would decline into a boutique of the banal, as the urge to censor is greatest where debate is most disquieting and orthodoxy most entrenched." *Rodriguez v. Maricopa County Community College Dist.*, 605 F.3d 703, 708 (9th Cir. 2010).

These First Amendment limitations apply to tort plaintiffs as well as to government regulators. One effect of these limitations is that a plaintiff may not recover for defamation, intentional infliction of emotional distress, or other speech-based torts unless the speech at issue contains false factual statements. This rule applies equally to public figures and private individuals where issues of public concern are involved. Otherwise, the use of rhetorical hyperbole in debate on public issues would be at the mercy of individual sensibilities and the First Amendment would no longer have the breathing space it needs to survive.

A ruling to the contrary in this case would have far-reaching effects on the media and other speakers, because the Westboro Baptist Church protests are not unique in any constitutionally meaningful sense. No intelligible standard could be devised based on the notion that the church's activities are especially "outrageous." This Court has rejected just such a test because it does not provide a reasoned way to distinguish such expression as the Falwell incest cartoon from traditional political cartoons. *Hustler*, 485 U.S. at 55. Ultimately, such a test would be inherently subjective and arbitrary. "Any nation which counts the Scopes trial as part of its heritage cannot so readily expose ideas to sanctions on a jury finding of falsity," or of outrageousness. *Time, Inc.*, 385 U.S. at 406.

ARGUMENT

A. Petitioner Is Asking that the Law Silence the Westboro Baptist Church

This case is not about intrusion on privacy or the captive audience, and it is not about disrupting war veterans' funerals. As the Senate *amici* point out, the federal government and 46 states have enacted laws that regulate picketing in or near cemeteries during funerals, and those laws are not implicated by this case. Senate *Amicus* at 4, 10-12. Maryland law currently sets a buffer of 100 feet between a funeral and any demonstration. Md. Code Ann., Crim. Law § 10-205(c). In this case the seven Westboro Baptist Church demonstrators complied with all police instructions and were 1,000 feet away from the Snyder funeral.[3]

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[3] *Snyder II*, 580 F.3d at 212 ("It was undisputed at trial that Defendants complied with local ordinances and police directions with respect to being a certain distance from the church."). *See id.* at 230 (Shedd, J., concurring) ("The Phelps never intruded upon a private place because their protest

Petitioner's claims that the demonstration intruded upon seclusion or created a "captive audience" are particularly difficult to fathom on this record. It is undisputed that Petitioner did not see the demonstrators until several hours *after* the funeral, when he watched a televised news report. *Snyder II,* 580 F.3d at 212. Petitioner's argument is also predicated on his exposure to the so-called "Epic" published on the church's website, which the Petitioner searched for and read, several weeks after the funeral. *Id.* Such remote viewing, both temporally and geographically, has little to do with this Court's captive audience jurisprudence, which requires a showing that "substantial privacy interests are being invaded in an essentially intolerable manner." *Cohen v. California*, 403 U.S. 15, 21 (1971).

This case is unlike any of this Court's captive audience decisions, in which unwilling listeners sought refuge from unwanted speech in the home, on public transportation, or when seeking medical services. None of those cases sought to shield a litigant from possible exposure to a message from a secondary source – such as a newscast or a website – but instead provided a limited buffer in specialized and confined settings.

Equally as important, none of the captive audience cases involved civil liability for speech. To the contrary, all imposed only limited time, place,

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occurred at all times in a public place that was designated by the police and located approximately 1,000 feet from the funeral.").

and manner restrictions that preserved adequate alternative channels to deliver the speaker's message. *See, e.g.*, *Frisby v. Schultz*, 487 U.S. 474, 483-484 (1988) (ban on residential picketing prohibited only targeting a particular house, leaving protesters free to march through the neighborhood, proselytize door-to-door, distribute literature, or send mail); *Hill v. Colorado*, 530 U.S. 703, 726-727 (2000) (eight-foot buffer between speaker and audience outside abortion clinic placed "no limitation on the number of speakers or the noise level, including the use of amplification equipment," and allowed the speaker "to communicate at a 'normal conversational distance'"); *Lehman v. Shaker Heights*, 418 U.S. 298 (1974) (restriction on political advertising applied only inside cars of city transit system). At the same time, this Court has not hesitated to invalidate captive audience restrictions that limit the ability to communicate. *E.g.*, *Scheck v. Pro-Choice Network of Western N.Y.*, 519 U.S. 357, 377 (1997) (fifteen-foot "floating buffer zone" violates the First Amendment).

Here, any question of intrusion or captive audience is addressed fully by federal and state laws that regulate picketing near cemeteries during funerals, and those provisions are not at issue in this case. However, the Petitioner seeks not to move the Westboro Baptist Church's speech to an acceptable distance, but to silence it altogether. He asks this Court to approve a tort remedy to shield him from any possible exposure to the church's message in news reports or online, not just at the time and location of the funeral.

Listeners' emotional reactions to speech, however, cannot serve as a justification for censorship. This Court has made clear that citizens "must tolerate insulting, and even outrageous, speech in order to provide 'adequate 'breathing space' to the freedoms protected by the First Amendment.'" *Boos v. Barry*, 485 U.S. 312, 322 (1985). *See also Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 206 (3d Cir. 2001) ("however detestable the views expressed may be, we cannot turn a blind eye to the First Amendment implications"); *Collin v. Smith*, 578 F.2d 1197, 1206-07 (7th Cir. 1978).

Additionally, the decision below did not "subordinate Mr. Snyder's First Amendment rights of free exercise and peaceful assembly to the Phelpses' free speech rights," as Petitioner maintains. Pet. Br. 55. The Free Exercise Clause protects only against government actions that impede religious observance, not against criticism by private speakers. *See United Brotherhood of Carpenters and Joiners of Am., Local 610, AFL-CIO v. Scott*, 463 U.S. 825, 830-831 (1983). *See also Noah v. AOL Time-Warner, Inc.*, 261 F. Supp. 2d 532, 546 (E.D. Va. 2003) (alleged termination of Internet service account because of pro-Islamic statements raised no First Amendment claim because the Constitution "does not protect against actions taken by private entities").

Moreover, it cannot be overlooked that, as strange and hateful as the Westboro Baptist Church's message may be, it is an expression of that group's religious beliefs as well. Asking the government to intervene because one sect criticizes another religion is deeply at odds with the Establishment Clause of the First Amendment. The Framers of the Constitution "knew the anguish, hardship and bitter strife that could come when zealous religious groups struggled with one another to obtain the Government's stamp of approval." *Engel v. Vitale*, 370 U.S. 421, 429 (1962). As a consequence, "the 'First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion.'" *McCreary County v. ACLU*, 545 U.S. 844, 860 (2005) (citation omitted). *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546-547 (1993). Such neutrality must be observed in this case.

B. The First Amendment Does Not Permit the Offensiveness of Speech to Trump Freedom of Expression

"Under the First Amendment there is no such thing as a false idea." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339 (1974). But, according to the Petitioner, an idea can be too *offensive* to receive constitutional protection.

Petitioner argues that the Fourth Circuit should be reversed because "even matters of 'public concern' lose some of their protection when interjected into the context of a private funeral." Pet. Br. 40. Some *amici* go even further, and assert that the Westboro Baptist Church does not merit First Amendment protection *at all*, in that its message is "completely without any 'redeeming social importance,'" Veterans of Foreign Wars Brief at 17, and because "[t]he Phelpses are not war protesters; they are zealots who target private citizens for harassment and psychological attack, exploiting those citizens' private grief and unbearable suffering to gain public attention and notoriety for the Phelpses' causes." Brief for Kansas, *et al.* at 6.

Petitioner's and *amici's* feelings may be understandable, but the remedy they seek lacks constitutional support. "The right to provoke, offend and shock lies at the core of the First Amendment," *Rodriguez*, 605 F.3d at 708, and the idea that a tort action may be based on the emotive impact of an idea cannot be reconciled with our historic commitment to free expression. *See, e.g.*, *United States v. Marcavage*, ___ F.3d ___, 2010 WL 2384839 at *12 (3d Cir. June 16, 2010) ("No matter one's personal feelings about abortion, the images are jarring, their shock value unmistakable. Presumably, that was the point.").

A key function of free speech is to invite dispute, and it "may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger." *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949). "[T]he point of all speech protection . . . is to shield just those choices of content that in someone's eyes are misguided, or even hurtful." *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 574 (1995). "There is no room under our Constitution for a more restrictive view." *Terminiello*, 337 U.S. at 4. *See Garrison v. Louisiana*, 379 U.S. 64, 73 (1964).

It is not easy to live up to such principles when expression is deeply disturbing, as it is here. Yet our

First Amendment jurisprudence recognizes that these protections will not long endure if we abandon them when the message is unusually repellant, or the target of the speech especially sympathetic. Thus, members of a neo-Nazi organization were permitted to march in Skokie, Illinois, where over half the population at the time was Jewish and five to seven thousand residents were survivors of concentration camps. *Village of Skokie v. National Socialist Party of Am.*, 69 Ill. 2d 605, 610 (1978). *See National Socialist Party of Am. v. Village of Skokie*, 432 U.S. 43 (1977). The Illinois Supreme Court recognized that the sight of swastikas and German-style uniforms was abhorrent to Jewish citizens and especially to the survivors of Nazi persecution, but still held that the First Amendment would not permit restricting the demonstration. The court explained:

> [T]he unpopularity of views, their shocking quality, their obnoxiousness, and even their alarming impact is not enough. Otherwise, the preacher of any strange doctrine could be stopped; the anti-racist himself could be suppressed, if he undertakes to speak in "restricted" areas; and one who asks that public schools be open indiscriminately to all ethnic groups could be lawfully suppressed, if only he choose to speak where persuasion is needed most.

Village of Skokie, 69 Ill. 2d at 618 (citation omitted).

From such difficult cases emerge constitutional protections that can weather the tests of time and turmoil. This Court has emphasized that "[t]he history of the law of free expression is one of vindication in cases involving speech that many citizens find shabby, offensive, or even ugly." *United States v. Playboy Ent. Group, Inc.*, 529 U.S. 803, 826 (2000). Higher values could not otherwise be preserved, for "[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion." *West Virginia Board of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

Claims that the Westboro Baptist Church falls outside this free speech tradition, and that its members should not be mistaken for "Vietnam War protesters, Jehovah's Witnesses, or Hare Krishnas," Brief for Kansas, *et al.* at 6, present a perplexing problem. By what calculus could it be determined that the church is more offensive than neo-Nazis or less "serious" than a lone anti-war protester whose jacket bears the slogan "Fuck the Draft"? *E.g.*, *Cohen*, 403 U.S. at 16. What test could be applied to find that its vituperative message falls beneath the dignity of the First Amendment? If the answer is that the church is especially outrageous and offensive, the response fails to provide either an intelligible standard or a justification for censorship. "Indeed, if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection." *FCC v. Pacifica Found.*, 438 U.S. 726, 745-746 (1978).

The Constitution does not take sides in political or religious disputes, and it does not permit the government to prescribe which ideas are worthy and which are not. The First Amendment protects firebrand priests and Vatican critics alike. *Teminiello*, 337 U.S. at 4; *Cantwell v. Connecticut*, 310 U.S. 296 (1940). It protects militant civil rights activists and white supremacists equally. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982); *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 134-35 (1992). It likewise shields those who speak for or against a woman's right to terminate a pregnancy. *Hill*, 530 U.S. at 703; *Bigelow v. Virginia*, 421 U.S. 809 (1975). And it protects those who would burn American flags or crosses as a form of protest, just as it does those who display them with pride. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992); *Texas v. Johnson*, 491 U.S. 397, 408-10 (1989). Simply put, "the government must remain neutral in the marketplace of ideas." *Hustler*, 485 U.S. at 56 (quoting *Pacifica*, 438 U.S. at 745-746).

It may well be that the Westboro Baptist Church's contributions to public discourse are negligible, but that is not the test for First Amendment protection. The government cannot justify regulation on the assumption that "the speech is not very important." *Playboy Ent. Group*, 529 U.S. at 826. Indeed, the Court just reaffirmed that speech cannot be censored on the ground that it lacks redeeming social importance. *United States v. Stevens*, 130 S. Ct. 1577, 1591 (2010). In doing so, it acknowledged that "[*m*]*ost* of what we say to one another lacks 'religious, political, scientific, educational, journalistic, historical, or artistic value' (let alone serious value), but it is still sheltered from government regulation." *Id.* at 1591 (emphasis in original).

More importantly, it misses the point to ask whether speech has sufficient "merit" to warrant First Amendment protection. *See* Brief for Kansas, *et al.* at 6. Even stupid or hateful ideas may contribute greatly to the marketplace of ideas by providing a "clearer perception and livelier impression of truth, produced by its collision with error." John Stuart Mill, On Liberty, Ch. II (1859).

The Westboro Baptist Church evidently seeks to persuade those who see its demonstrations of the rightness and necessity of its views. But most who witness its virulent homophobia are likely to be repulsed, and to wonder what could produce such callousness and intolerance. Few are likely to accept the church's odd theory of divine retribution, and people instead may ask what type of supreme being could slaughter the innocent over a political dispute. And its anti-American message may well rekindle a sense of patriotism among those who see the church's crude denunciations of the United States. All such reactions are set loose in the marketplace of ideas by the church's harsh protests, even without the aid of the counter-demonstrations that invariably accompany their appearances.

Accordingly, the Fourth Circuit got it right when it held that the First Amendment necessarily protects the church's protest activities.

C. Petitioner's Proposed Application of Tort Liability Would Undermine Basic First Amendment Values

The Petitioner has no greater ability to restrict the church's activities through the mechanism of private tort claims than the government would through the direct regulation of expression. *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 777 (1986). Although the First Amendment is not an absolute shield against civil liability, it provides broad protection for offensive or outrageous expression. This Court set the correct standard in *Hustler*, 485 U.S. at 56, and it is equally applicable in this case.

In *Hustler*, the Court held that the First Amendment barred a claim for intentional infliction of emotional distress brought by the Reverend Jerry Falwell in response to a parody advertisement describing a "drunken incestuous rendezvous with [Falwell's] mother in an outhouse." *Id.* at 48. It found:

> [P]ublic figures and public officials may not recover for the tort of intentional infliction of emotional distress . . . without showing in addition that the publication contains a false statement of fact which was made with 'actual malice,' *i.e.*, with knowledge that the statement was false or with reckless disregard as to whether or not it was true.

Id. at 56 (citation omitted). The Court rejected the proposition that "so long as the utterance was intended to inflict emotional distress, was outrageous, and did in fact inflict serious emotional distress, it is of no constitutional import whether the statement was a fact or an opinion, or whether it was true or false." *Id.* at 53.

Petitioner's argument that *Hustler* is confined to "the special status of those who intentionally enter the public arena" reads the decision far too narrowly. Pet. Br. 28. *Hustler* did not just provide heightened protection for speech that involves public figures. To the contrary, its logic extends to all matters of public concern, at least as far as it prevents liability for opinion, hyperbole, or other statements that do not assert actual or provable facts. The Eighth Circuit has explained that "expressions of opinion are protected whether the subject of the comment is a private or public figure" in rejecting a plaintiff's emotional distress claim. *Deupree v. Iliff*, 860 F.2d 300, 304-05 (8th Cir. 1988) (internal citations omitted). The plaintiff in that case was a schoolteacher rather than a high-profile minister. *See also Channel 4 KGBT v. Briggs*, 759 S.W.2d 939, 942 (Tex. 1988) (under *Hustler*, "the same protections which the first amendment affords defendants from libel claims also protect them from intentional infliction of emotional distress claims").

This principle is essential to prevent would-be plaintiffs from evading constitutional proscriptions merely by recasting failed defamation actions as emotional distress or other claims.[4] The First

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[4] The district court below awarded summary judgment to the Respondents on the defamation claim, finding that their speech was "essentially ... religious opinion" and "would not realistically tend to expose Snyder to public hatred or scorn." *Snyder v. Phelps*, 533 F. Supp. 2d 567, 572-73 (D. Md. 2008) ("*Snyder I*"). Petitioner did not appeal this decision. *Snyder II*, 580 F.3d at 213 n.3. Similarly, the libel claim in *Hustler* was unsuccessful because the jury found that the ad parody could not "reasonably be understood as describing actual facts about

Amendment does not permit speech constitutionally shielded from defamation liability to give rise to other types of liability based purely on the content of the speech. *See, e.g., Dworkin v. Hustler Mag. Inc.*, 867 F.2d 1188, 1193 n.2 (9th Cir. 1989) ("An emotional distress claim based on the same facts as an unsuccessful libel claim cannot survive as an independent cause of action.") (quoting *Leidholdt v. L.F.P. Inc.*, 860 F.2d 890, 893 n.4 (9th Cir.1988)); *see also* Hon. Robert D. Sack, *et al.*, Sack on Defamation § 13.6.1 (2010) ("Protected speech is protected speech, irrespective of the label given it by the plaintiff").

This high level of First Amendment protection for speech about matters of public concern – even where the plaintiffs are not public figures – is consistent with decades of Supreme Court precedent.

For example, the Court rejected a private figure's suit under a New York right of publicity statute on the grounds that "the constitutional protections for speech and press preclude the application of the New York statute to redress false reports of matters of public interest in the absence of proof that the defendant published the report with knowledge of its falsity or in reckless disregard of the truth." *Time, Inc.*, 385 U.S. at 387-88. It likewise ruled that a state may not "extend a cause of action for damages for invasion of privacy caused by the publication of the name of a deceased rape victim which was publicly revealed in connection with the

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[respondent] or actual events in which [he] participated." *Hustler*, 485 U.S. at 49.

prosecution of the crime." *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 471 (1975). It declared unconstitutional a statute forbidding newspapers to publish the name of any youth charged as a juvenile offender, finding that "if a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need to further a state interest of the highest order." *Smith v. Daily Mail Pub. Co.*, 443 U.S. 97, 103 (1979). And it applied the same rationale to the publication of the identity of a rape victim. *Florida Star v. B.J.F.*, 491 U.S. 524, 541 (1989).

In each of these cases, the Court found that a private figure's interests, while important, nonetheless must yield to the interest of unfettered discussion in matters of public concern. And the cases make clear that speech relates to a matter of public concern if it deals with political, religious, scientific, or social questions, *even if* the speech refers to a private person or is offensive to that person. *See, e.g., Florida Star*, 491 U.S. at 536-37 (speech concerned "a matter of public significance" where "the article generally, as opposed to the specific identity contained within it, involved a matter of paramount public import: the commission, and investigation, of a violent crime which had been reported to authorities"); *Daily Mail*, 443 U.S. at 103.

Petitioner's reading of *Hustler* would swallow the rule, even as to the facts of *Hustler* itself. It would permit Jerry Falwell's mother (if living) or wife to sue for intentional infliction of emotional distress where he could not, since they were not public figures. *See Hustler*, 485 U.S. at 48 (noting that the parody portrayed Falwell's mother "as drunk and immoral"). This narrow view of *Hustler* also would undermine First Amendment protection for public debate generally, because such discourse often sparks unvarnished speech likely to offend private citizens. *See, e.g., Milkovich*, 497 U.S. at 20 (protection must be assured for "statements that cannot 'reasonably [be] interpreted as stating actual facts' about an individual") (citation omitted); *Old Dominion Branch No. 496, National Ass'n. of Letter Carriers, AFL-CIO v. Austin*, 418 U.S. 264, 284 (1974) (citation omitted) ("the most repulsive speech enjoys immunity provided it falls short of a deliberate or reckless untruth"); *Greenbelt Cooperative Pub. Ass'n. v. Bresler*, 398 U.S. 6, 14 (1970) ("rhetorical hyperbole" and "vigorous epithet" is constitutionally protected).

The hate-filled rants of the Westboro Baptist Church unquestionably are extreme and unpleasant, but that hardly puts them beyond the realm of public debate. In certain respects, the church's blunt speech on such issues as gay rights, America's involvement in foreign wars, the Catholic Church abuse scandals, and many aspects of the "culture war," does not set it far apart from the pronouncements of some other prominent clerics. For example, evangelists Jerry Falwell and Pat Robertson explained the terrorist attacks of 9/11 as God's punishment for the secularization of America by "the pagans, and the abortionists, and the feminists, and the gays and the lesbians," and singled out People for the American Way and the

ACLU for special culpability. *See, e.g.*, John F. Harris, *God Gave U.S. 'What We Deserve,' Falwell Says*, Wash. Post, Sep. 14, 2001, at C03.

Natural disasters frequently inspire politically-tinged assertions of divine retribution. One evangelist declared Hurricane Katrina to be God's punishment for "the national sin of abortion," while orthodox Rabbi Ovadia Yosef deemed it to be payback for President Bush's support of the August 2005 withdrawal of Jewish settlers from Gaza.[5] Al-Qaeda in Iraq, for its part, claimed that "God attacked America and the prayers of the oppressed were answered." And Minister Louis Farrakhan described Katrina as "God's way of punishing America for its warmongering and racism." *See* Dyson, Come Hell or High Water at 178-202. Whatever contributions such apocalyptic visionaries may or may not make to public understanding, it is clear the First Amendment would not permit them to be removed from the debate.

This conclusion is unaltered by the extent to which a private individual's name might become linked to a matter of public controversy. In *Frazier v. Boomsma*, 2008 WL 3982985 (D. Ariz. Aug. 20, 2008) (not reported in F. Supp. 2d), the court enjoined enforcement of a state law that prohibited using the name of a deceased soldier in selling T-shirts that protested the Iraq war. The court explained that "[s]uperimposing 'Bush Lied-They Died' over the names of fallen soldiers obviously critiques the initiation and administration of the war in Iraq, among the most debated issues in current American politics." *Id.* at *3. While it is not difficult to imagine that a grieving parent who supports the war might be outraged that his son or daughter's name could be used for such a purpose, the First Amendment would not permit such expression to be the basis of an emotional distress tort.

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[5] *See, e.g.*, Alan Cooperman, *Some Say Natural Catastrophe Was "Divine Judgment,"* Houston Chron., Sept. 5, 2005; Michael Eric Dyson, Come Hell or High Water: Hurricane Katrina and the Color of Disaster 178-202 (Basic Civitas 2006) (2006) ("Come Hell or High Water"). *See also* Editorial, *Miniskirts and major quakes; An Iranian cleric's peculiar linkage of 'loose' women and natural disasters fits a pattern*, L.A. Times, Apr. 23, 2010, at A24.

The same may be said of author Ann Coulter's recent attack on four widows of victims of the 9/11 terrorist attacks in her book, Godless: The Church of Liberalism. Dubbing the widows "The Witches of East Brunswick," Coulter wrote, "I've never seen people enjoying their husbands' deaths so much." She also asked: "[H]ow do we know their husbands weren't planning to divorce these harpies? Now that their shelf life is dwindling, they'd better hurry up and appear in *Playboy*."[6] Whether such writings contribute more (or less) to public discourse than does the Westboro Baptist Church may be debatable, but both are protected equally by the First Amendment.

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[6] Ann Coulter, Godless: The Church of Liberalism 103, 112 (Three Rivers Press 2007) (2006). *See also* Raymond Hernandez, *Clinton Calls Comments On Widows Mean-Spirited*, N.Y. Times, June 8, 2006, at B1.

The fact that the church has chosen public fora in the vicinity of military funerals as its preferred venue does not place its speech beyond the pale. And it is false to suggest that heavily penalizing such speech will have no significant adverse effect on the public forum. In this respect, the State *amici's* assertion that "[c]ondemning the Phelpses' conduct here will not open the door to wide-ranging tort liability, because *no one else in the history of this country* has utilized their tactics," is factually incorrect. Brief for Kansas, *et al.* at 4 (emphasis in original).

Historically, funerals have been a common venue for protests for speakers from across the political spectrum. *See, e.g.*, Candace J. Samolinski, *Gun Foe Attending Funeral As Protest*, Tampa Tribune, June 6, 2003, at 1. For example, anti-police protests have occurred at the funerals of those killed by police officers. *See, e.g.*, *Violent Protests Erupt After Funeral; Police In Riot Gear And Angry Mourners Faced Off After Services For A Black Man Shot By Undercover New York City Officers*, Orlando Sentinel, Mar. 26, 2000, at A4. Funerals also have been the site of labor protests. In Chicago in 1999 and 2000, local Teamsters, unhappy with a non-union funeral home, picketed local funerals that were facilitated by the non-union home. *See, e.g.*, Molly Sullivan, *Funeral pickets return; Mourners call union 'disrespectful'*, Chicago Sun-Times, Mar. 10, 2000, at 1.

Such protests may take place at funerals of the famous as well as the more obscure. For example, demonstrators upset with Justice

Brennan's views on abortion picketed his funeral. *See, e.g.*, Richard Carelli, *Brennan Bid Final 'So Long, Pal' Government Elite Pay Respects at Justice's Last Farewell*, The (Baltimore) Daily Record, July 30, 1997, at 13. By the same token, anti-abortion protestors have appeared at funerals of lesser-known figures, such as slain abortion provider Dr. John Bayard Britton. *See, e.g.*, Laura Griffin, *'We can't even bury our dead in peace,'* St. Petersburg Times, Aug. 4, 1994, at 1B. However tasteless such demonstrations may be, the First Amendment protects them subject to reasonable time, place, and manner restrictions.

Whether based on the location of the Westboro Baptist Church protests, the use of inflammatory language, or the church's claim to know the contents of God's mind, it is difficult to understand how its speech could be punished as "outrageous" without censoring a wide range of other expression on controversial subjects. As this Court reasoned in *Hustler*, "[i]f it were possible by laying down a principled standard to separate" the Falwell incest cartoon from traditional political cartoons, "public discourse would probably suffer little or no harm. But we doubt that there is any such standard, and we are quite sure that the pejorative description 'outrageous' does not supply one." *Hustler*, 485 U.S. at 55. The same is true here.

The outcome sought by the Petitioner would subject a wide variety of speech to the heckler's veto, where any private individual can claim to have been targeted with offensive and outrageous speech. For example, the publication of a letter to the editor calling for a holy war against Muslims in connection with the Iraq war, *Citizen Pub. Co. v. Miller*, 115 P.3d 107 (Ariz. 2005), or caustic anti-immigrant speech increasingly common in the public discourse, could give rise to emotional distress claims. *See, e.g.*, Anti-Defamation League, *Immigrants Targeted: Extremist Rhetoric Moves into the Mainstream*, www.adl.org/civil_rights/anti_immigrant/rhetoric.asp. Other religious expression that arouses a passionate response could include publishing cartoons depicting the prophet Mohammed. *See, e.g.*, Evan Perez, *Two Charged in Plot on Danish Paper*, Wall St. J., Oct. 28, 2009, at A13.

Permitting such claims most certainly will invite discriminatory application. "'Outrageousness' in the area of political and social discourse has an inherent subjectiveness about it which would allow a jury to impose liability on the basis of the jurors' tastes or views, or perhaps on the basis of their dislike of a particular expression." *Hustler*, 485 U.S. at 55.

The single characteristic separating Westboro Baptist Church demonstrations from any number of other political protests is their viewpoint. It is doubtful, for example, whether the jury would have considered the church's protest "outrageous" if it had been aimed at the funeral of a domestic pro-Taliban fighter rather than a member of the United States armed forces. Such subjectivity is understandable, and probably inevitable. But it illustrates precisely why courts must be wary of imposing liability for the *content* of non-defamatory speech.

CONCLUSION

William Jennings Bryan, the three-time presidential candidate who served as a special prosecutor in *State of Tennessee v. Scopes*, died five days after the trial ended. Reporting on the event, H.L. Mencken, who was not known for his gentle prose, described Bryan as "a walking malignancy" whose eyes were "blazing points of hatred," and he opined that the motivating force of the trial, "[e]vangelical Christianity, as everyone knows, is founded upon hate." H.L. Mencken, *Bryan*, The (Baltimore) Evening Sun, July 27, 1925 (reprinted in A Religious Orgy in Tennessee 103-109). Bryan's widow, who was not a public figure, understandably would have been devastated and outraged at such a description, published to the world as she was mourning the death of her husband.

Petitioner's theory of the First Amendment would allow Bryan's widow to collect ruinous damages from Mencken and *The Evening Sun* for intentional infliction of emotional distress for such callous insensitivity during a time of bereavement. If this Court agrees, it is not just those on the periphery of serious public discourse who will be affected. Debate on controversial issues necessarily will be dampened, as will the ability to report on such matters, and First Amendment protections developed over decades will be lost. Accordingly, *amici* respectfully ask this Court to affirm the decision of the Fourth Circuit.

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APPENDIX A

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of reporters and editors that works to defend the First Amendment rights and freedom of information interests of the news media. The Reporters Committee has provided representation, guidance and research in First Amendment and Freedom of Information Act litigation since 1970.

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MR-125 (Ill. App. Ct. Mar. 24, 2009), *The Mortgage Specialists, Inc. v. Implode-Explode Heavy Industries, Inc.*, No. 2009-0262 (N.H. June 30, 2009), and *Barclays Capital Inc. v. Theflyonthewall.com, Inc.*, 10-1372-CV (2d Cir. June 21, 2010).

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The National Press Photographers Association is a non-profit organization dedicated to the advancement of photojournalism in its creation, editing and distribution. NPPA's almost 9,000 members include television and still photographers, editors, students and representatives of businesses that serve the photojournalism industry. Since 1946, the NPPA has vigorously promoted freedom of the press in all its forms, especially as that freedom relates to photojournalism. Our members often shoot compelling and sometimes disturbing visual images related to matters of public concern. For the Court to now shoot the messengers bearing such news by exempting those images from First Amendment protection is a matter of grave concern to our Association.

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The Society of Professional Journalists is dedicated to improving and protecting journalism. It is the nation's largest and most broad-based journalism organization, dedicated to encouraging the free practice of journalism and stimulating high standards of ethical behavior. Founded in 1909 as Sigma Delta Chi, SPJ promotes the free flow of information vital to a well-informed citizenry; works to inspire and educate the next generation of journalists; and protects First Amendment guarantees of freedom of speech and press.

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AMICUS
CURIAE
BRIEF

No. 09-751

In The Supreme Court of the United States

ALBERT SNYDER,

Petitioner,

v.

FRED W. PHELPS, SR., *et al.*,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Fourth Circuit

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QUESTIONS PRESENTED

1. Does *Hustler Magazine, Inc. v. Falwell* apply to a private person versus another private person concerning a private matter?

2. Does the First Amendment's freedom of speech tenet trump the First Amendment's freedom of religion and peaceful assembly?

3. Does an individual attending a family member's funeral constitute a captive audience who is entitled to state protection from unwanted communication?

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INTEREST OF AMICUS CURIAE[1]

The Rutherford Institute is an international civil liberties organization headquartered in Charlottesville, Virginia. Founded in 1982 by its President, John W. Whitehead, the Institute specializes in providing legal representation without charge to individuals whose civil liberties are threatened or infringed and in educating the public about constitutional and human rights issues. Attorneys affiliated with the Institute have filed *amicus curiae* briefs in this Court on numerous occasions over its 25 year history.[2] Institute attorneys currently handle over one hundred cases nationally, including many cases that concern the interplay between the government and its citizens. One of the purposes of The Rutherford Institute is to preserve the most basic freedoms our nation affords its citizens—in this case, the constitutional right to engage in free speech and protest.

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[1] No counsel for either party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amicus curiae, its members, or its counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief.

[2] The Rutherford Institute has filed *amicus curiae* briefs with this Court in numerous First Amendment cases, such as *Crawford v. Marion County Election Bd.*, 533 U.S. 181 (2008), *Pleasant Grove City, Utah v. Summum*, 129 S. Ct. 1125 (2009), and *Christian Legal Society v. Martinez*, No. 08-1371, 2010 WL 2555187 (U.S. Jun. 28, 2010).

STATEMENT

Amicus incorporates by reference the statement of facts set forth in the response of Respondents Fred W. Phelps, *et al.* to the Petition for Certiorari.

SUMMARY OF ARGUMENT

The Petitioner, Albert Snyder, asks this Court to sustain a civil jury verdict rendering judgment against the Respondents' offensive protest on a public street near his son's funeral service because, he argues, the "captive audience" doctrine grants him protection from the Respondents' "unwanted communication." However, just as government cannot "lodge broad discretion in a public official" to exercise indiscriminate licensing powers over speech-related activities,[3] it likewise should not cede to a civil jury the power to make selective judgments on whether public protest on issues of national public importance and concern may be sanctioned because of emotional harm upon its listeners. No matter how distasteful or pernicious the speech, the potential use of a jury "as [an] instrument[ ] for selectively suppressing some points of view" is fraught with capriciousness, and too steep a price for society in matters involving public protest.[4] As this Court has indicated "[i]f there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."[5] This principle applies no less to the prohibitive chilling effect of civil jury judgments on public protest in a traditional public forum. This Court should, therefore, decline Mr. Snyder's request for an exception to the time-honored "privilege of a citizen of the United States to use[ ] the streets and parks for communication of views on national questions. . . ."[6] Mr. Snyder's proposed expansion of the captive audience doctrine as an exception to constitutional protections afforded Respondents' political speech is not only entirely inappropriate, it threatens potentially devastating consequences for the continued vitality of free speech in the United States, and should be rejected in this Court's adjudication of this case.

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[3] *Police Dept. of City of Chicago v. Mosley,* 408 U.S. 92, 97 (1972).

[4] *Id.*

ARGUMENT

Albert Snyder's request that this Court sustain the jury verdict against the Respondents' anti-social protest near his son's funeral service is based on his view that the funeral and funeral environs constitutes a "captive audience" which—he contends—entitles him to "state protection" from the Respondents' "unwanted communication." Even if protest at a funeral might in some circumstances conceivably fall under the captive audience doctrine,[7] the factual context of this case provides absolutely no basis for application of that exception to the traditional First Amendment protections afforded to Respondents' speech. Mr. Snyder's claim to the contrary should, therefore, be rejected.

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[5] *Texas v. Johnson*, 491 U.S. 397, 414 (1989).

[6] *Hague v. CIO*, 307 U.S. 496, 515-516 (1939).

I. THE RESPONDENTS' PROTEST TOOK PLACE IN A TRADITIONAL PUBLIC FORUM AND DID NOT DISRUPT OR INTERFERE WITH THE FUNERAL OF MR. SNYDER'S SON.

This Court has previously recognized that the only place where one enjoys a right to be free of unwanted expression occurring in a traditional public forum is within the privacy of one's home. This is because "[t]he State's interest in protecting the well-being, tranquility, and privacy of the home is certainly of the highest order in a free and civilized society."[8] Unlike other areas, the home is unique in the privacy right that it affords its inhabitants. In contrast, amidst the hustle and bustle of the public parks, streets and sidewalks, where the right of free speech is historically at its zenith, the right of

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[7] *See, e.g., Lee v. Weisman*, 505 U.S. 577 (1992) (finding Establishment Clause liability where a student attending a graduation ceremony has no realistic choice but to attend and listen).

[8] *Carey v. Brown*, 447 U.S. 455, 471 (1980); *Frisby v. Schultz*, 487 U.S. 474 (1988).

privacy afforded citizens is at its nadir. The Fourth Circuit's refusal to allow a constitutional exception for non-disruptive, peaceful—but nevertheless offensive—protest on a public street near the funeral of a fallen serviceman demonstrates an appropriate commitment to longstanding First Amendment principles. As this Court has previously noted:

> The vitality of civil and political institutions in our society depends on free discussion. Accordingly a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger.[9]

In the present case, the Respondents continue the historic American tradition of public protest on a matter of public concern in the most open forum—on a public street where the announced funeral and the activities of others participating in the event were part of a milieu of public expression. Moreover, the Respondents' protest near the church was entirely peaceful, was conducted in full compliance with all time, place, and manner restrictions imposed by local authorities, and was not directed in its substance to the serviceman in question, or his family.[10]

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[9] *Terminiello v. City of Chicago*, 337 U.S. 1, 4 (1949). In the interest of preserving the vitality of Free Speech, it has often been stated that, in public, "the burden normally falls upon the viewer to 'avoid further bombardment of [his] sensibilities simply by averting [his] eyes.'" *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 210–11 (1975) (alteration in original) (quoting *Cohen v. California*, 403 U.S. 15, 21 (1971)).

A. The Petitioner's Claim That The Funeral Was A Private Affair Is Belied By The Fact That The Petitioner Advertised The Funeral.

The Petitioner argues that his son's funeral was a private affair and should be afforded favored privacy status under the law. In doing so, not only is Mr. Snyder asking this Court, in effect, to legislate new law regarding social conventions, he requests the Court to promulgate a new standard of privacy applicable to free speech occurring on public streets near funerals—a function better suited to the legislative branch. Mr. Snyder's claim of privacy is, however, inconsistent with the fact that he took out several advertisements in the local media announcing the details of the funeral, including its time and location.[11] Moreover, he participated in detailed media interviews about his fallen son and "[t]he media . . . were given a place to set up just off the grounds of the church, and were present before, during and after the funeral[.]"[12] All 1,200 seats of the church were full, strangers attended, and nobody was blocked from entrance to the funeral.[13] As such, it would be logically inconsistent, and judicially imprudent, to uphold Mr. Snyder's claim that the funeral was a strictly private affair, in the context of his announcing, promoting, and making it accessible to the world. This doctrinal incoherence would be particularly acute given the prevailing expression of public patriotism at funerals for military personnel killed in Afghanistan and Iraq, the many other public protests against the actions of our government taken in those countries, and the well-known ongoing program of protests of the Respondents near funerals of military personnel killed in such actions[14] Mr. Snyder's open announcement of the details of the funeral, and the area arranged for media coverage of the event, was akin to an invitation for those who support or oppose the war to appear at or near the event for expressive purposes. Thus, whether it was those waiving American flags in patriotic support of Mr. Snyder's son and the war he helped prosecute, or those like Respondents with grievances about the war and the society sponsoring the war, it can hardly be said that there was any reasonable expectation of privacy on the streets outside the funeral, or that those involved in that portion of the funeral that occurred on the public streets and sidewalks were a "captive audience."

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[10] Brief of Respondents in Opposition to Petition for Writ of Cert. at 6, *Snyder v. Phelps*, No. 09-751 (U.S. Jan. 20, 2010).

[11] *Snyder v. Phelps*, 580 F.3d 206, 211 (4th Cir. 2009).

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[12] Brief of Respondents in Opposition to Petition for Writ of Certiorari, *supra* note 10, at 4.

[13] *Id.* at 8.

[14] The Westboro Baptist Church's protests have spanned nearly twenty years, beginning in 1991. To date, the Respondents have appeared at about 600 funerals. Krista Gesaman, *Free (Hate) Speech*, Newsweek, Mar. 17, 2010, www.newsweek.com/2010/03/16/free-hate-speech.html.

B. Even If The Petitioner Is Deemed to Have A Right Of Privacy, The Respondents' Protest Took Place In A Traditional Public Forum, Was On A Matter Of Public Importance, Went Unnoticed By The Petitioner, And Did Not Interfere With The Funeral.

Whatever society's views on the messages that the Respondents preach, it cannot be doubted that the Respondents are sincere, that their message—about the tolerance of homosexuality in society—is of public concern, and, in their view, is of critical importance to the future of the United States. Such "speech concerning public affairs is more than self-expression; it is the essence of self-government."[15] Just as decades ago the vitriolically anti-Catholic messages broadcast by Jehovah's Witnesses on the streets and sidewalks of heavily Catholic neighborhoods of New Haven were recognized as being constitutionally protected, so too, the message of the Respondents is no less entitled to constitutional protection.[16] The First Amendment was not enacted to protect the ears of the majority who disagree with a message, but the tongues of the minority who wish to be heard.[17]

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[15] *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964).

The protest in this case is yet another example of uninhibited, robust public debate on controversial issues of public importance[18] and part of the

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[16] *Cantwell v. Connecticut*, 310 U.S. 296, 304 (1940). ("[T]he fact that society may find speech offensive is not a sufficient reason for suppressing it").

[17] "It is . . .well established that speech may not be prohibited because it concerns subjects offending our sensibilities." *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 245 (2002). *See also FCC v. Pacifica Foundation*, 438 U.S. 726, 745 (1978); Jeffrey Shulman, *When Is Religious Speech Outrageous?:* Snyder v. Phelps *and the Limits of Religious Advocacy*, 114 PENN ST. L. REV. PENN STATIM 13 (2010) ("The most common of legal commonplaces is that the First Amendment protects speech that some people—perhaps most people—will find offensive. Indeed, the protection of offensive speech is one of the great hallmarks of our constitutional order, the stamp that establishes the genuineness and the generosity of our freedoms, including a longstanding tradition of religious liberty.").

[18] Eugene Volokh, *Freedom of Speech and the Intentional Infliction of Emotional Distress Tort*, _ CARDOZO L. REV. DE NOVO ___ (forthcoming 2010). It is not just the Respondents who see their speech as being of public importance. "Respondents' communications were directed toward an issue of extraordinary public interest: the death of an American marine in the service of his country." Brief for The Anti-Defamation League as Amicus Curiae in Support of Neither Party at 6, *Snyder v. Phelps*, No. 09-751.

"equality in status in the field of ideas" that exists in this country.[19] The Respondents' viewed their protest as a matter of critical public concern because

> [w]hen Mathew Snyder enlisted in the Marines in October, 2003, the United States had been at war in Iraq for seven months, and the whole world was talking about the war. At the same time, the nation was occupied with the question of homosexuals in the military; and with the issue of the ongoing sex-abuse scandal in the Catholic Church. Not to mention the ongoing debate in this nation in the churches, the legislative halls, the schools, and every other major institution or public forum, about the morals and conduct of America.[20]

The linkage between public morals and the judgment of God is not always apparent to the citizenry of a nation, and is obviously perceived differently by individuals, interests groups, the electorate and public officials, but there can be no question that it is a matter of legitimate public concern. Witness the more eloquent linkage drawn by Abraham Lincoln in his Second Inaugural Address between the morality of slavery and the War Between the States:

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[19] *Mosley*, 408 U.S. at 96.

[20] Brief of Respondents in Opposition to Petition for Writ of Certiorari, *supra* note 10, at 2.

> If we shall suppose that American Slavery is one of those offences which, in the providence of God, must needs come, but which, having continued through His appointed time, He now wills to remove, and that He gives to both North and South, this terrible war, as the woe due to those by whom the offence came, shall we discern therein any departure from those divine attributes which the believers in a Living God always ascribe to Him? Fondly do we hope—fervently do we pray—that this mighty scourge of war may speedily pass away.[21]

If, as Mr. Snyder demands, this Court were to allow juries to impose civil "liability for supposedly outrageous speech . . . then all this speech could thus lead to liability, university disciplinary sanctions, or in principle even criminal punishment (should a state choose to criminalize it)."[22] However pernicious one may find the Respondents' speech, and however much sympathy one may have for Mr. Snyder as the father of a fallen service member, this

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[21] President Abraham Lincoln, Second Inaugural Address (Mar. 4, 1865).

[22] Volokh, *supra* note 18.

Court should remember that "we depend for . . . correction not on the conscience of judges and juries but on the competition of other ideas."[23]

From the argument presented by Mr. Snyder, one would assume that the Respondents were protesting directly outside the church so as to disturb, interrupt or interfere with the funeral service, or deviating from the traditional manner in which fundamental free speech is delivered; or, that somehow because of the nature of their speech—or, perhaps even because it may arguably detract from the service of fighting men and women in Afghanistan or Iraq, that the content of Respondents' speech should be excluded from the protections of the Constitution. On the contrary, the Respondents protested on a public street—*the* quintessential traditional public forum—and did not disrupt or interfere with the funeral. Not only did they protest peacefully, their protest was approximately 1,000 feet away from the entrance to the church, and they were not observed by the attendees.[24] During the funeral procession, the Respondents were "hundreds of feet" away from Mr. Snyder.[25] Indeed, the Petitioner was not even aware at the time the funeral occurred that the protest was underway.[26] Moreover, the Respondents left when the funeral started. This absence of intrusion was confirmed by the fact that the officiating priest was not aware of any protesting by the Respondents and he did not hear anyone mention any picketing.[27] Furthermore, Mr. Snyder did not see the signs and there is no evidence in the record that any other attendees saw the signs.[28] Consequently, these protests "neither physically nor aurally invade[d] a funeral ceremony; nor [did] their protests amount to the kind of harassing behavior required to constitute an "invasion" at common law."[29]

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[23] *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339-40 (1974).

[24] *Snyder*, 580 F.3d at 212.

[25] Brief of Respondents in Opposition to Petition for Writ of Certiorari, *supra* note 10, at 7.

Justice Douglas, concurring in an extension of the "captive audience" doctrine to public transit advertising, reiterated long ago that protests on our nation's public streets "for communication of views on national questions . . . must not, in the guise of regulation, be abridged or denied."[30] From the views he expressed, it is quite apparent that the critical ingredients for a captive audience are lacking here, namely, that on the public streets, the Respondents possessed the "right to express [their] views to those who wish to listen," and second, that the Respondents did not "force [their] message upon an audience incapable of declining to receive it."[31] Moreover, this analysis properly accounts for the fact that there are countervailing rights at issue. The privacy right that Mr. Snyder seeks to extend to his son's funeral as part of what he perceives to be a captive audience, cannot supersede the rights of citizens to speak and hear messages on matters of legitimate public concern except where an audience is otherwise coerced to listen. In other words, Mr. Snyder's request is "substantially limited by the rights of others."[32]

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[26] *Snyder*, 580 F.3d at 212 ("Furthermore, it was established at trial that Snyder did not actually see the signs until he saw a television program later that day with footage of the Phelps family at his son's funeral.").

[27] Brief of Appellant at 4, *Snyder v. Phelps*, 580 F.3d 206 (4th Cir. 2009).

[28] *See* note 26, *supra*.

[29] Christina E. Wells, *Privacy and Funeral Protests*, 87 N.C. L. REV. 151, 184 (2008).

Even if this Court is tempted to follow the approach of the Sixth Circuit, which held that "[i]ndividuals mourning the loss of a loved one share a privacy right similar to individuals in their homes or individuals entering a medical facility[,]"[33] the present case does not allow for a verdict for the Petitioner because, as the Fourth Circuit noted, the record did not support any finding that Mr. Snyder's privacy rights were infringed by the protest.[34] The only disruption that apparently took place was a minor incident when a man in a truck shouted at the protestors.[35] None of the facts of the case, therefore, justify any deviation for the principle that, "as a general matter, . . . in public debate our citizens must tolerate insulting, and even outrageous, speech in order to provide adequate 'breathing space' to the freedoms protected by the First Amendment."[36] Given the absence of noise or intrusion from the Respondents' protests, this is not a case where the audience of funeral attendees, "ha[d] no choice but to sit and listen, or perhaps to sit and try not to listen."[37] Nor did it result in the type of coercive situation that a person "had no real alternative to avoid."[38] Even if the funeral setting were to be contrasted to the abortion clinic setting, legitimate time, place, or manner restrictions are only permissible in order to ensure the patient has access to the clinic and to curb noise that may be heard *inside* the clinic.[39] Here, the Respondents neither impeded access to the church, nor did they create any noise that could be heard within the church once the funeral had started.

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[30] *Lehman v. City of Shaker Heights et al.*, 418 U.S. 298, 305 (1974) (Douglas, J., concurring) (quoting *Hague*, 307 U.S. at 515-16).

[31] *Id.* at 307.

[32] *Pub. Utils. Comm'n of the District of Columbia v. Pollak*, 343 U.S. 451, 464 (1952).

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[33] *Phelps-Roper v. Strickland*, 539 F.3d 356, 364-65 (6th Cir. 2008) (citing *Hill v. Colorado*, 530 U.S. 703 (2000)).

[34] *Snyder*, 580 F.3d at 230 (Shedd, J., concurring).

[35] Reply Br. For Appellant at 2, *Snyder v. Phelps*, 580 F.3d 206 (4th Cir. 2009) citing Joint App., Vol. VIII, 2287.

[36] *Boos v. Barry*, 485 U.S. 312, 322 (1988) (quoting *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 56 (1988)).

[37] *Lehman*, 418 U.S. at 307 (Douglas, J., concurring).

Almost exclusively because of the protests of the Respondents, the vast majority of the States and the federal government have enacted statutes that limit the ability of the Respondents to protest at funerals.[40] The Respondents, both at this funeral and at the other funerals they have picketed, fully complied with these restrictions.[41] The primary

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[38] *Weisman*, 505 U.S. at 598.

[39] *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753, 754 (1994).

[40] To date, at least forty States and the federal government have enacted statutes imposing time, place, and manner requirements concerning funeral protests. Devin Dwyer, *States Line Up Against Funeral Hecklers in Supreme Court Brief*, ABC News, May 31, 2010, abcnews.go.com/Politics/Supreme_Court/states-file-supreme-court-fred-phelps-westboro-baptist/story?id=10770402&page=1

[41] The Fourth Circuit observed that the record shows that the Respondents complied with all local ordinances and

[Footnote continued on next page]

purpose of these statutes—which is the proper province of the legislative branch—is that they restrict "disruption" of funerals.[42] The facts in this case show no disruption—the Respondents were in full compliance with the applicable time, place, and manner laws—so the real question posed by this case is whether such protests can essentially be cut off altogether, even where there is no showing of disruption, and whether the judiciary should assume to itself the power to do so. Permitting a jury to delve into these questions as a roaming censor of what should and should not be permitted offensive speech, and then to render verdicts reflecting the jury's judgment, would do just that.

C. The Jury Should Not Have Been Permitted To Determine Liability Or Damages.

This Court has previously recognized the danger presented when juries are allowed to determine liability for speech that offends majority sensibilities. In *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 510 (1984) (citations omitted), the Court noted that juries are "unlikely to be neutral with respect to the content of speech and hold[] a real danger of becoming an instrument for

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[Footnote continued from previous page]
police directions and the protest passed off in a peaceful manner. *Snyder*, 580 F.3d at 212.

[42] *See generally* Wells, *supra* note 29, at 177 (discussing various state statutes that limit the ability of persons to disrupt funerals).

the suppression of those 'vehement, caustic, and sometimes unpleasantly sharp attacks,' . . . which must be protected if the guarantees of the First and Fourteenth Amendments are to prevail." Any imposition of liability in such circumstances would be doubly concerning in cases such as this because "liability easily ends up turning on how much juries condemn the speaker's viewpoint."[43] In the present case, the distaste of the jury for the speech of the Respondents was obviously a considerable factor, as shown by the level of damages awarded to the Petitioner.[44] No doubt the politically explosive power of this distaste is reflected in the briefs *amici curiae* filed in support of Mr. Snyder by the two political leaders of the U. S. Senate (along with 40 other Senators), 48 of the 50 State Attorneys General, the Veterans of Foreign Wars and the American Legion, among others. The decision of the jury proved that "[c]ivil action judgments 'reflect social conventions and tend to reflect what the majority believes' to be acceptable behavior."[45]

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[43] Posting of Eugene Volokh to The Volokh Conspiracy, http://volokh.com/posts/chain 1194479521.shtml (Nov. 7, 2007).

[44] The jury awarded the Petitioner a total of $10.9 million, of which $2.9 million was compensatory damages and $8 million was punitive damages. The punitive damages were later reduced by the district court. *Snyder*, 580 F.3d at 212.

[45] Volokh, *supra* note 18 (quoting Chelsea Brown, *Not Your Mother's Remedy: A Civil Action Response to the Westboro Baptist Church's Military Funeral Demonstrations*, 112 W. VA. L. REV. 207, 232 n. 144 (citation omitted)).

However, under the First Amendment, political currency, the popularity of a message, or even concepts of "acceptable behavior" are not, and should not, be the yardsticks by which constitutional protections are determined.

If the decision of the Court of Appeals for the Fourth Circuit is reversed, there is a grave risk that "[m]any statements might be labeled 'outrageous' by some judge, jury, university administrator, or other government actor."[46] On the contrary, "such speech is an important part of the public debate. It should not be punished with multi-million dollar liability. . . . And it should not be deterred by the risk of such liability[.]"[47] Furthermore, given the vagueness of the "outrageousness" standard, such potential liability "'operates to inhibit the exercise of (those) freedoms.' Uncertain meanings inevitably lead citizens to 'steer far wider of the unlawful zone' . . . than if the boundaries of the forbidden areas were clearly marked."[48] It is undeniably the role of the trial courts to act as gatekeepers when a plaintiff requests a jury impose liability for presumptively protected expression—a role that is indispensible in protecting the guarantees of the First Amendment.

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[46] *Id.*

[47] *Id.*

[48] *Id.* (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972))(alteration in original).

II. THE CAPTIVE AUDIENCE DOCTRINE REPRESENTS A NARROW EXCEPTION TO THE FIRST AMENDMENT'S FREEDOM OF SPEECH GUARANTEE, AND SHOULD NOT BE EXPANDED FURTHER.

This Court has previously held that "we are often 'captives' outside the sanctuary of the home and subject to objectionable speech," but has nonetheless refused to uphold bans on the unwanted speech.[49] This is because "[t]he captive audience idea indeed finds its source in the idea of protecting people within their homes."[50] Consequently, courts have been "notoriously reluctant to apply the captive audience rationale outside the home."[51] For example, the Eighth Circuit has observed that "the home is different, and, in our view, unique. Allowing other locations, *even churches*, to claim the same level of constitutionally protected privacy would, we think, permit government to prohibit too much speech and other communication."[52]

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[49] *Cohen*, 403 U.S. at 21 (1971).

[50] Stephen R. McAllister, *Funeral Picketing Laws and Free Speech*, 55 KAN. L. REV. 575, 588 (2007).

[51] *Id.*

[52] *Olmer v. Lincoln*, 192 F.3d 1176, 1182 (8th Cir. 1999) (emphasis added).

Outside of the home, this Court has explained that the "recognizable privacy interest in avoiding unwanted communications varies widely in different settings. It is far less important when 'strolling through Central Park' than when 'in the confines of one's own home,' or when persons are 'powerless to avoid' it."[53] Therefore, the captive audience doctrine is only appropriate in those very narrow circumstances where highly confined spaces,[54] or "substantial privacy interests are being invaded in an essentially intolerable manner"[55] or where individuals may not simply "avert their eyes" to the message they find objectionable.[56] Here, the Respondents protest on the public streets may be avoided by simple aversion of the eyes. Nothing else was required to block out the Respondents' message as they protested, marching and displaying placards. There was not even any need to plug one's ears to avoid the message.

Mr. Snyder concedes that the captive audience doctrine "depends principally on two factors: whether a sufficient privacy interest of the listener is at stake to warrant protection and whether the speaker's conduct interferes with the listener's privacy in an intolerable manner."[57] How then can he claim a "substantial privacy interest" in a funeral that he himself advertised to the world? And how can it be claimed that the funeral was "invaded in an essentially intolerable manner" when the protest occurred well outside the venue, when the attendees were unaware that the protests were occurring and when the protests concluded *before* the funeral began? The occasions where captive audiences in the public domain are genuinely found are incredibly rare, as shown by this Court's previous holdings,[58] and this is not one of them

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[53] *Hill*, 530 U.S. at 716 (quoting *Cohen*, 403 U.S. at 21-22).

[54] *Lehman*, 418 U.S. at 307 (Douglas, J., concurring); *cf. Lee v. Weisman*, 505 U.S. 577 (1992).

[55] *Cohen*, 403 U.S. at 21.

[56] *Id.*

Mr. Snyder would, in essence, have this Court generate yet another new right, *i.e.*, a "civility-based privacy interest."[59] Such "[a] civility-based privacy interest is firmly grounded in communicative impact—regulating speech because of the audience's response to it—and allows government officials to restrict speech that offends us."[60] If the Court were to accept Mr. Snyder's argument that attendees at funerals are "captive" to the messages of others expressed on public streets near the funeral venue—even when, as here, the attendees are not even aware of the messages of the Respondents—then there is a high risk that countless other situations will likewise warrant protection from the captive audience doctrine because, "captive audiences are present pretty much anywhere[.]"[61] Protests against same-sex marriage at weddings, school policies at graduation ceremonies, racism at church meetings, offensive T-shirts at political events, and abortion at counseling centers, to name but a few, could all likewise trigger liability. In all such instances, an individual could claim to be "captive" in the sense that he or she is obliged to attend the event and that in doing so may be subjected to a message displayed by another attendee. If the funeral context can satisfy the captive audience requirements, what else can? Such ambiguities create a chilling effect on speech, as citizens, unsure whether their message may be targeted and that they could be legally liable, instead suppress that message rather than run the gauntlet of potential liability. The consequential threats to free speech from such a loose standard, not just in this case but in an array of other areas, would constitute a grave injury to the protections provided by the First Amendment.[62]

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[57] Brief for the Petitioner at 48, *Snyder v. Phelps*, No. 09-751 (U.S. Jan. 20, 2010).

[58] *See, e.g., Weisman*, 505 U.S. 577 (1992) (finding that students were effectively unable to boycott their graduation ceremony). Likewise, funeral attendees who cannot hear protests at some distant location are not the equivalent of the streetcar riders who are captive to the messages displayed on the streetcar, *See generally Lehman*, 418 U.S. 298 (1974) (holding that riders on a streetcar were "captive" to placard advertisements on the streetcar).

[59] Wells, *supra* note 29, at 155.

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[60] *Id.* at 158.

[61] Eugene Volokh, *RE: Reversal of intentional infliction of emotional distress / intrusion upon seclusion verdict against Phelpsians for hostile picketing 1000 feet away from funeral*, Sept. 26, 2009, http://www.mail-archive.com/xonlawprof@lists.ucla.edu/msg17935.html (last visited June 20, 2010).

Whatever desire there may be on the part of society to silence the Respondents' message, and "[a]s distasteful as the church's language might be to others, its message is the heart—and . . . the soul—of the [Westboro Baptist] church."[63] While "[t]he instinct to regulate or punish is powerful and understandable[,]"[64] it is the responsibility of judges to protect the equality of ideas in the public square. This is no less a part of "administer[ing] justice without respect to persons, and do[ing] equal right to the poor and to the rich, . . . under the Constitution and laws of the United States,"[65] even if that means courts "must share [a] foxhole with scoundrels of every sort, but to abandon the post because of the poor company is to sell freedom cheaply. It is a fair summary of history to say that the safeguards of liberty have often been forged in controversies involving not very nice people."[66] This is just such a case.[67]

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[62] *See, e.g.*, Eugene Volokh, *The Phelpsians' Speech, the Mohammed Cartoons, and the Slippery Slope*, The Volokh Conspiracy, March 8, 2010, http://volokh.com/2010/03/08/the-phelpsians-speech-the-mohammed-cartoons-and-the-slippery-slope-2/ (last visited June 30, 2010) (arguing that allowing the restriction of the Phelpsians speech "would lead to the restriction of much more valuable speech[]" and that "it's better to protect the Phelpsians' speech, appalling as it is, than to allow its restriction—because by allowing the restriction, we'd be giving a powerful extra tool to those who would restrict a great deal of other speech.").

[63] Shulman, *supra* note 17, at 17.

[64] Wells, *supra* note 29, at 153.

CONCLUSION

For the foregoing reasons, the judgment of the Courts of Appeals for the Fourth Circuit should be affirmed.

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[65] 28 U.S.C. § 453 (2010).

[66] *Kopf v. Skyrm*, 993 F.2d 374, 380 (4th Cir. 1993).

[67] The rejection of the Petitioner's request to establish liability for peaceful protesting near military funerals would not give the Respondents *carte blanche* to engage in whatever protests they wish. Protestors will continue to be bound by time, place, and manner requirements. Moreover, they may be held liable for the torts of trespass and/or defamation if their actions so warrant. In this case, however, the protests were clearly within the bounds of the relevant time, place, and manner restrictions and fully protected speech on matters of public debate.

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AMICUS
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BRIEF

No. 09-751

In The
Supreme Court of the United States

◆

ALBERT SNYDER,

Petitioner,

v.

FRED W. PHELPS, SR., et al.,

Respondents.

◆

**On Writ Of Certiorari To The
United States Court Of Appeals
For The Fourth Circuit**

◆

BRIEF OF *AMICI CURIAE* SCHOLARS OF FIRST AMENDMENT LAW IN SUPPORT OF RESPONDENT PHELPS

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INTEREST OF THE *AMICI*

Amici are professors of Constitutional Law who teach and write on the First Amendment, including Christina Wells, Alan Chen, Heidi Kitrosser, Ronald Krotoszynski, Lyrissa Lidsky, and Timothy Zick.[1] Amici respectfully file this brief in support of the protected speech in this case, which involves the constitutional rights of speakers to express unpopular and even contemptible opinions without fear of government sanctioned punishment. Allowing claims of invasion of privacy and intentional infliction of emotional distress against protesters who are speaking on matters of public concern would undermine the core protections of the First Amendment. Such claims chill public discourse by subjecting speakers to crushing tort liability whenever a message rises to an undefined level of offensiveness. Tort claims premised on subjective criteria such as offensiveness or outrageousness empower the majority to censor minority or unpopular ideas based upon arbitrary and unpredictable standards. The Court has carefully crafted its First Amendment doctrines to require external indicia of harm, more than mere offensiveness, to protect against content based regulation of speech, and should continue in this tradition.

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[1] The parties in this case have consented to the filing of this one brief. Copies of the consent letters are being filed herewith. No counsel for any party authored this brief in whole or in part. No such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity aside from amici curiae or their counsel made a monetary contribution to the preparation or submission of this brief.

◆

SUMMARY OF ARGUMENT

The offensive speech in this case falls squarely within the bounds of First Amendment protected speech. First, the Court has long protected offensive speech because it contributes to discourse on issues of public interest and because efforts to censor it often result from antipathy towards the speaker's message. Second, the Court has never found a captive audience in a public forum based purely on the content of speech. Abhorrence for the expression in this case does not justify creating a new dignity based privacy interest that would allow censorship of unwanted or offensive speech. Third, the First Amendment does not allow punishment of speech solely because of its emotional impact on the listener. For this reason, the Court requires external indicia of harm before finding speech unprotected. The Court should not permit an evasion of these objective requirements by allowing tort liability under theories of invasion of privacy or intentional infliction of emotional distress ("IIED") in this case. Permitting tort liability for offensive speech would chill public discourse by allowing massive damage awards based on subjective criteria. Categorizing the peaceful funeral protests in this case as unprotected speech contradicts the Court's existing jurisprudence and undermines the very purpose of the First Amendment.

◆

ARGUMENT

Funeral services are important and time-honored rites for family and friends of the deceased. But the interests of mourners in honoring their loved ones without disruption do not hinge on the outcome of this case. Speakers' rights to express themselves without fear of government sanctioned punishment for their unpopular opinions, on the other hand, do.

Mourners at a funeral already enjoy substantial protection from disruptions. Unwanted visitors, including speakers, can be excluded from funeral ceremonies held on private property or in public cemeteries. *See Hudgens v. NLRB*, 424 U.S. 507, 520 (1976); *see also* 38 U.S.C. § 2413(a)(2)(A)(ii) (regulating noisy and disruptive protestors near funeral ceremonies at national cemeteries). The government may impose reasonable regulations on raucous, noisy, and disruptive speech, and punish protestors who threaten mourners or incite imminent physical retaliation. *Grayned v. City of Rockford*, 408 U.S. 104 (1972); *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 772 (1994); *Watts v. United States*, 394 U.S. 705 (1969); *Gooding v. Wilson*, 405 U.S. 518, 523 (1972). And at least forty states and the federal government have enacted statutes that regulate funeral protests. *See* Christina E. Wells, *Privacy and Funeral Protests*, 87 N.C. L. Rev. 151, 158 n.37 (2008) (listing statutes). To the extent such laws are crafted within constitutional bounds, they are a better mechanism than tort liability for balancing the interests of mourners and speakers.[2]

In this case, the peaceful funeral protest fully complied with all the applicable laws and restrictions. While demonstrating near the funeral ceremony of Matthew Snyder, Reverend Phelps and other members of the Westboro Baptist Church ("the Phelps") engaged in an orderly demonstration on a public street. They abided by all official directives to remain a certain distance from the ceremony, a distance the parties agree was at least several hundred feet. *Snyder v. Phelps*, 580 F.3d 206, 212 (4th Cir. 2009); Pet. Br. at 4; Br. in Opp'n to Writ of Cert. at 1 (U.S. Jan. 20, 2010). Mr. Snyder ("Snyder") did not see the content of the Phelps' signs during the ceremony, instead viewing them for the first time during a news broadcast later that day. 580 F.3d at 212. Similarly, Snyder found the Internet post, "The Burden of Marine Lance Cpl. Matthew Snyder," on the Phelps' website while running a Google search after the funeral. *Id.*

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[2] Although many statutes attempt to conform to the Court's precedents, *see, e.g.*, 38 U.S.C. § 2413, other statutes suffer from significant constitutional infirmities. *See, e.g.*, *Phelps-Roper v. Nixon*, 509 F.3d 480 (8th Cir. 2007), *cert. denied*, 129 S. Ct. 2865 (2009) (No. 08-1244) (finding it unlikely at the preliminary injunction stage that Missouri statute was consistent with the First Amendment).

Any disruption of Snyder's mourning is based solely on the emotional impact of constitutionally protected speech. That is, Snyder's tort claims for IIED and invasion of privacy rest entirely on the offensive content of the protestors' message. A ruling that allows tort liability in this case would create new and expanded avenues for the majority to suppress speech it finds disrespectful and uncivil. The Court has never recognized such an interest in regulating speech. *See, e.g.*, *Boos v. Barry*, 485 U.S. 312, 322 (1988) ("A 'dignity' standard, like the 'outrageousness' standard that we rejected in *Hustler*, is so inherently subjective that it would be inconsistent with 'our longstanding refusal to [punish speech] because the speech in question may have an adverse emotional impact on the audience.'") (citing *Hustler Magazine v. Falwell*, 485 U.S. 46, 55 (1988)). Although Snyder's anguish was real, profound, and understandable, it is not actionable.

I. THE FIRST AMENDMENT PROHIBITS REGULATION OF SPEECH BASED SOLELY ON ITS OFFENSIVE MESSAGE

To promote the exchange of ideas in a free society, the First Amendment protects speech that espouses offensive or unpopular positions. The Court has long recognized that expression can "stir people to anger . . . strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea." *Terminiello v. City of Chicago*, 337 U.S. 1, 4 (1949). But a fundamental tenet of the

Court's jurisprudence is that the government may not curtail speech "simply because the speaker's message may be offensive to his audience." *Hill v. Colorado*, 530 U.S. 703, 716 (2000); *see also Forsyth County v. Nationalist Movement*, 505 U.S. 123, 134-35 (1992); *Texas v. Johnson*, 491 U.S. 397, 414 (1989); *Boos*, 485 U.S. at 322; *Falwell*, 485 U.S. at 55-56; *Street v. New York*, 394 U.S. 576, 592 (1969); *Cantwell v. Connecticut*, 310 U.S. 296, 310 (1940).

The Court's reasons for protecting offensive speech are two-fold. First, speech on matters of public concern retains its value even when delivered in an offensive manner. Indeed, "[t]he vitality of civil and political institutions in our society depends on free discussion. . . . Accordingly, a function of free speech under our system of government is to invite dispute." *Terminiello*, 337 U.S. at 4. Second, attempts to punish speech based on its content often censor unpopular expression. Unpopular speech is more likely to offend people than conventional wisdom. Thus, allowing indiscriminate punishment of offensive speech would "effectively empower a majority to silence dissidents simply as a matter of personal predilections." *Cohen v. California*, 403 U.S. 15, 21 (1971).

This case implicates both of the Court's reasons for protecting offensive speech. Although the expression here was provocative, offensive, and disrespectful, that expression falls squarely within the realm of public discourse. The Phelps' online posting and signs, which bore messages including "Thank God for Dead Soldiers," "God Hates the USA," "God

Hates You," "Pope in Hell," and "Semper Fi Fags," expressed the Phelps' opinions on the wars in Iraq and Afghanistan and the validity of the Catholic faith, as well as their belief that the wars were the ultimate result of the American public's alleged willingness to embrace homosexuality. *Snyder*, 580 F.3d at 212. National news outlets cover these same topics, and citizens debate these very issues every day.[3]

Allowing tort liability in this case would create a liability scheme that equates the "intrusiveness" and "outrageousness" requirements of invasion of privacy and IIED with offensiveness. Such a scheme turns the First Amendment on its head by allowing punishment of speech based on its content. *See, e.g.*, *FCC v. Pacifica Found.*, 438 U.S. 726, 745 (1978) ("[T]he fact that society may find speech offensive is not a sufficient reason for suppressing it. Indeed, if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection."). The Court, however, has never recognized an invasion of privacy claim premised purely on abhorrence of the speaker's message. Similarly, for IIED claims, the Court has refused to allow liability based purely on outrageousness standards because "outrageousness . . . has an inherent subjectiveness about it which would allow a jury to impose liability on the basis of jurors' tastes or views, or perhaps on the basis of their dislike of a particular expression." *Falwell*, 485 U.S. at 55. Eliminating protection for core political speech because it offends or disrespects others would eviscerate the First Amendment by allowing individuals to censor speech simply by filing a tort claim.

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[3] Media outlets regularly carry headlines about these controversial ideas. *See, e.g.*, Rod Nordland, *12 NATO Soldiers, 7 From U.S., are Killed in Afghanistan*, N.Y. Times, June 8, 2010, at A11; Monica Davey, *In Iowa, Other Issues Crowd out Gay Marriage*, N.Y. Times, June 8, 2010, at A16; Christopher Hitchens, *Bring the Pope to Justice*, Newsweek, Apr. 23, 2010; Charles McLean & P.W. Singer, *Don't Ask. Tell. Why the Military Should Soldier on with Repealing "Don't Ask, Don't Tell,"* Newsweek, June 4, 2010; Peter Moskos, *Don't Ask, Don't Tell: Farewell to My Father's Idea*, Wash. Post, June 4, 2010, at A17; Maura Dolan, *Bid to Ban Gay Marriage Will Stay on Ballot, California Supreme Court Rules*, L.A. Times, July 17, 2008.

II. PEACEFUL FUNERAL PROTESTS HELD IN PUBLIC DO NOT CREATE A CAPTIVE AUDIENCE WITHOUT AN UNAVOIDABLE PHYSICAL OR AURAL INTRUSION

The Court's captive audience doctrine, which borrows heavily from the intrusion branch of privacy torts when balancing privacy interests and free speech rights, eschews regulation of speech based upon its offensive content. The Court generally recognizes a captive audience only in limited circumstances where the expression involves a physical or aural intrusion, or an intrusion into the home, that the individual cannot avoid. *See Madsen*, 512 U.S. 753; *Schenck v. Pro-Choice Network*, 519 U.S. 357 (1997); *Frisby v. Schultz*, 487 U.S. 474 (1988). Accordingly, the Court also rejects attempts to curtail speech based purely on its emotional or psychological impact. *See Erznoznik v. City of Jacksonville*, 422 U.S. 205, 211-12 (1975) (holding invalid a content based city ordinance barring certain movies because the offended viewer could readily avert his eyes); *see also* Wells, 87 N.C. L. Rev. at 155-56, 189-91 (describing how the Court's refusal to find a captive audience based on the psychological impact of speech parallels the common law's rejection of recovery for purely psychological invasions under the invasion of privacy tort).

Nothing in the facts of this case suggests that an intrusion of the type recognized by the Court ever occurred at the funeral ceremony. Rather, in the absence of any physical or aural intrusion on the ceremony, Snyder complains of a purely psychological intrusion from the emotional impact of a message that offended him. This Court should not extend the narrowly defined parameters of the captive audience doctrine to encompass intrusions from offensive speech, nor should it manufacture a privacy interest in being free from offensive messages while in public, even when in the vicinity of funeral ceremonies. To do so would transform an already amorphous, ill-defined, and malleable privacy interest into a tool of content based, or viewpoint based, discrimination.

A. Only Unavoidable Physical or Aural Intrusions Create a Captive Audience Due to the Limited Privacy Interest in Public

Speech receives maximum protection when exercised peacefully in a traditional public forum. *United States v. Grace*, 461 U.S. 171, 177 (1983); *Schenck*, 519 U.S. at 377. The Court has repeatedly recognized that individuals in public are often "subject to objectionable speech" and that the government can protect audiences in public spaces only after "a showing that substantial privacy interests are being invaded in an essentially intolerable manner." *Cohen*, 403 U.S. at 21. The Court's approach thus recognizes that "in public debate . . . citizens must tolerate insulting, and even outrageous, speech in order to provide adequate breathing space to the freedoms protected by the First Amendment." *Madsen*, 512 U.S. at 774 (citing *Boos*, 485 U.S. at 322).

In other words, individuals do not have any "right to be let alone" or to be free from unwanted messages in public. The Court has rejected the notion that audiences in public fora have a "generalized 'right to be left alone' on a public street or sidewalk." *Schenck*, 519 U.S. at 383. Even in *Hill v. Colorado*, a decision that has generated some confusion in the lower courts' funeral protest analysis,[4] the Court

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[4] *See, e.g.*, *McQueary v. Stumbo*, 453 F. Supp. 2d 975, 991 (E.D. Ky. 2006) ("[I]t is not clear whether the *Hill* Court justified the ordinance at issue by the state's interest in protecting

(Continued on following page)

expressly stated that its opinion did not create "a right to avoid unpopular speech in a public forum." 530 U.S. at 718 ("We . . . are not addressing whether there is such a 'right.' ").

Because individuals have a limited privacy interest in public, the Court has found only unavoidable physical or aural invasions sufficient to invoke the captive audience doctrine. Thus, the Court has upheld bans on aural intrusions by noisy and boisterous protestors, *see, e.g.*, *Madsen*, 512 U.S. 753, as well as physical intrusions from protestors who approached the audience so closely that it amounted to an invasion of personal space. *Hill*, 530 U.S. 703; *Schenck*, 519 U.S. 357.

In keeping with this limited privacy interest in public, the Court has also rejected attempts to base a captive audience rationale purely on the offensiveness of the protestors' message. For example, the *Madsen* Court refused to uphold an injunction banning images "observable" by persons within medical clinics because the only "plausible reason" such signs would disturb patients was if the patients

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citizens from unwanted communications. . . ."); *see also Phelps-Roper v. Strickland*, 539 F.3d 356, 364 (6th Cir. 2008) (citing *Hill* for the proposition that "the right to avoid unwelcome speech has special force in the privacy of the home but can also be protected in confrontational settings"); *cf. Phelps-Roper v. Nixon*, 509 F.3d at 487 (holding that plaintiff had a fair chance of proving that the government has no compelling interest in protecting citizens from unwanted speech outside the home).

"found the expression contained in such images disagreeable." *Madsen*, 512 U.S. at 773. As the Court explained, patients could simply "pull the curtains" to avoid the unwanted messages. *See also Cohen*, 403 U.S. at 21 (refusing to permit criminal liability for the offensive message inscribed on a man's jacket because viewers in the public courthouse could look away); *Erznoznik*, 422 U.S. at 210-11 (striking down a law banning displays of public nudity at drive-in theaters in order to protect unsuspecting passersby because they could look away). In public, then, "the burden normally falls upon viewers to avoid further bombardment of [their] sensibilities simply by averting [their] eyes." *Id.* at 210-11 (quoting *Cohen*, 403 U.S. at 21).

An individual's emotional vulnerability does not change the nature of the intrusion required under the captive audience doctrine. For example, the *Hill* Court's discussion of the emotional and physical vulnerability of patients was not the basis for its ruling. *Hill,* 530 U.S. at 729. Rather, the Court upheld a small no-approach zone around persons entering medical clinics that prevented "potential physical and emotional harm suffered when an unwelcome individual delivers a message (whatever its content) by physically approaching an individual at close range." *Id.* at 718 n.25. The emotional and physical harm at issue in *Hill* did not result from the perceived offensiveness of protestors' messages, but rather from the potentially harassing and intimidating nature of the protestors' physical intrusion into a patient's personal space. *See also Madsen*, 512 U.S. at 772-73. In fact, the Court made clear that protestors were allowed to deliver their message as offensively as they wished as long as they remained eight feet away. *Hill*, 530 U.S. at 729-30.

Thus, under the Court's captive audience jurisprudence, an individual's privacy is only invaded where the individual is (1) in public; (2) encounters a physical or aural intrusion, not a psychological intrusion; and (3) cannot avoid the intrusion by moving or looking away. Nothing in the facts of this case suggests that the speech was so intrusive that mourners could not avoid it. The peaceful funeral protestors stood in a designated public area at least several hundred feet away from the ceremony, and the demonstration did not aurally or physically disrupt the funeral. Indeed, Snyder did not even see the message on the signs until after the ceremony, when he saw them on television. *Snyder*, 580 F.3d at 212. In other words, the basis for Snyder's claim rests entirely on the content of the protestors' message. Snyder complains only of the psychological intrusion from the content of the message and the mere presence of the protestors. These purely psychological intrusions do not create a captive audience in a public forum, even for emotionally vulnerable mourners at a funeral.

B. The Broader Privacy Interest Found in the Home Does Not Apply to Funeral Ceremonies Held in Public

In an effort to sidestep the physical or aural intrusion requirements of the Court's captive audience doctrine, Snyder and supporting amici urge the Court to expand the heightened privacy interest found in the home and apply it to funerals. For good reason, the Court has limited that heightened privacy interest to the home. Extending it to other circumstances, including funerals, would circumvent the Court's precedents prohibiting punishment of speech based upon its emotional impact and create a sweeping new exception to First Amendment protections.

1. A Broader Privacy Interest Exists Only in the Home

The Court has only recognized a heightened privacy interest to be free of unwanted speech in the home. *Frisby v. Schultz*, 487 U.S. at 484 (1988) ("Although in many locations, we expect individuals simply to avoid speech they do not want to hear, . . . the home is different."). Because of the unique privacy interest in the home, the Court has recognized unreasonable intrusions on residential privacy that would not be upheld in public fora. *See, e.g., Rowan v. U.S. Post Office Dep't*, 397 U.S. 728 (1970); *Pacifica*, 438 U.S. 726 (upholding laws controlling broadcasts or mailings of indecent content into the home). In *Frisby*, for example, the Court upheld an ordinance prohibiting "targeted picketing" aimed at single residences, recognizing that such picketing was "inherently and offensively intru[sive] on residential privacy" because "the home becomes something less than a home." 487 U.S. at 486 (citation omitted).

The Court has refused to extend the heightened privacy interest and the attendant "inherently intrusive" rationale beyond the confines of the home. Later cases, such as *Madsen* and *Schenck*, rejected the notion that communications by protestors inherently intruded on the privacy of clinic patients. *Madsen*, 512 U.S. 753; *Schenck*, 519 U.S. 357. Rather, the Court required a physical or aural intrusion before engaging in the captive audience analysis. Nor did *Hill*'s discussion of the right to be free from unwanted speech in "confrontational settings" extend *Frisby*'s heightened privacy interest beyond the confines of the home. *Hill*, 530 U.S. at 717. Rather than assume speech was inherently intrusive as in *Frisby*, the *Hill* Court found speech unprotected because the speakers' physical intrusions into the patients' personal space amounted to harassment. *Hill*, 530 U.S. at 718 ("None of our decisions has minimized the enduring importance of 'a right to be free' from persistent 'importunity, following and dogging' after an offer to communicate has been declined."). Thus, the Court has not expanded the heightened privacy rationale of *Frisby* to speech that occurs in public spaces, even where confrontational protestors targeted and harassed vulnerable patients.

2. Extending the Residential Privacy Interest to Funeral Ceremonies Violates Free Speech Principles

A funeral ceremony held in a public place does not invoke the privacy interest found only within the home. In an effort to censor unwanted but otherwise unintrusive speech, Snyder asks this Court to create a privacy interest to be free from offensive messages while in public. *See, e.g.*, Pet. Br. at 53 (arguing for "a privacy interest in attending his son's funeral without disruption by unwanted protests"). As support for this argument, Snyder points to the heightened privacy interest identified in *Frisby* and attempts to analogize a funeral to the home. However, such an argument contorts the holding of *Frisby* beyond recognition. Even in *Frisby* the Court did not allow regulation of protests solely because of their offensive message. *Frisby*, 487 U.S. at 482-84 (noting that the statute was constitutional because protestors could still engage in generalized protests throughout the neighborhood). No right to be free from offensive messages exists, nor should the Court create one based on the misplaced analogy between a protest held in a public place hundreds of feet from a funeral ceremony and one held just outside a private home.

The only intrusions identified in this case are psychological intrusions stemming from the content of the protestors' message. In the absence of any physical or aural intrusion, Snyder argues that the "targeting" of his son's funeral, coupled with the solemn nature of a funeral and his unique vulnerability during mourning, made the mere presence of protestors inherently intrusive, much like that of the protestors in *Frisby*. Pet. Br. at 46-55. But such an argument destroys the concept of inherent intrusiveness as a function of the unique nature of the home and allows for content based regulation of speech. Any claim of intrusion into privacy in this case must rest on a characterization of the Phelps' speech as inherently intrusive (1) because of the protestors' message or (2) because of the protestors' presence several hundred feet from the ceremony. Pet. Br. at 52-53. Either characterization is dangerous and risks compromising free speech protections.

First, recognizing that listeners can be captive to offensive messages conveyed from a physical distance would destroy the Court's doctrines protecting offensive speech. Such a finding disconnects the notion of captivity from any inquiry into whether the speech at issue poses an unavoidable physical or aural intrusion. Instead, it conflates intrusiveness with offensiveness and permits punishment of speech that society deems uncivil or disrespectful. But this Court has always rejected punishment of speech on such a basis. *Boos*, 485 U.S. at 322 (finding unconstitutional a law prohibiting the display of signs tending to bring foreign governments into public odium or disrepute); *Cohen*, 403 U.S. at 22-24 (rejecting the idea that states may censor their citizens to promote public morality or civility); *Johnson*, 491 U.S. at 415 (reasoning that the state cannot regulate flag burning in order to promote respect for the flag). Such attempts to regulate speech ultimately allow "a single community to use the authority of the state to confine speech within its own notions of propriety." Robert Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, &* Hustler Magazine v. Falwell, 103 Harv. L. Rev. 603, 632 (1990); *see also Terminiello*, 337 U.S. at 4-5.

Second, the claim that the protestors' presence was inherently intrusive merely masks what truly upset mourners: the protestors' offensive message. This case is entirely about the content of the protestors' speech. Snyder does not complain of intrusions from the presence of counter-protestors like the Patriot Guard Riders or others who expressed messages of support. Br. in Opp'n at 6-7. Snyder found the Phelps' protest intrusive not because of their presence but because they espoused ideas he found abhorrent and inconsistent with the solemnity of his son's funeral. A notion of inherent intrusiveness that allows for regulation of speech based upon the audience's hostile response violates the Court's longstanding precedents. *See Forsyth County*, 505 U.S. at 134-35 (rejecting as content based an escalating fee system for protestors needing greater police protection because "[t]hose wishing to express views unpopular with bottle throwers . . . may have to pay more for their permit"); *Edwards v. South Carolina*, 372 U.S. 229, 237 (1963) (reversing breach of peace convictions of civil rights protestors based on evidence "which showed no more than that the opinions which they were peaceably expressing were sufficiently opposed to the views of the majority of the community to attract a crowd and necessitate police protection").

The Court's free speech jurisprudence does not and should not define privacy as freedom from offensive or uncivil speech. Instead, the Court should make explicit what has long been implicit: in a public forum, offensive speech that is not otherwise "independently proscribable" may not be regulated unless it involves physical or aural intrusions. *Madsen*, 512 U.S. at 774.

III. EXTERNAL INDICIA OF HARM ARE NEEDED BEFORE COMPROMISING FREE SPEECH PROTECTIONS TO ALLOW TORT LIABILITY

As with the captive audience doctrine, the Court's low value speech categories require something beyond offensiveness before allowing regulation of speech. Attempts to liken tort liability for IIED and invasion of privacy to existing categories of unprotected speech contradict the Court's First Amendment jurisprudence. In this case, the Court is asked to allow tort liability for the emotional impact of the Phelps' speech. This runs counter to the Court's longstanding precedents that reject attempts to regulate speech based solely on its content.

A. Narrowly Drawn Low Value Speech Categories Guard Against Punishment of Unpopular or Offensive Speech

The Court has carefully crafted its low value speech doctrines to identify limited and narrow categories of speech capable of restriction.[5] This "has not been on the basis of a simple cost-benefit analysis." *United States v. Stevens*, 130 S. Ct. 1577, 1586 (2010). Instead, the Court carefully limits the circumstances in which it compromises the protection of speech in order to prevent punishment of offensive messages. Thus, it finds speech unprotected only in narrow circumstances where the speech does not contribute to the exchange of ideas as evidenced by strong external indicia of harm following from such speech or from actions that are independently harmful, such as threats or lies. *Cf.* Daniel Farber, *The Categorical Approach to Protecting Speech in American Constitutional Law*, 84 Ind. L. J. 917, 930 (2009).

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[5] Those categories include incitement to violence (of either illegal activity or retaliation), *Brandenburg v. Ohio*, 395 U.S. 444, 447-48 (1969); fighting words, *Gooding*, 405 U.S. at 523; defamation, *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964); fraud, *Va. Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976); true threats, *Virginia v. Black*, 538 U.S. 343 (2003), *Watts*, 394 U.S. 705; obscenity, *Miller v. California*, 413 U.S. 15 (1973); child pornography, *New York v. Ferber*, 458 U.S. 747 (1982); and speech integral to criminal conduct, *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 498 (1949).

In *Terminiello*, the Court noted that "provocative and challenging" speech was:

> protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest. There is no room under our Constitution for a more restrictive view. For the alternative would lead to standardization of ideas either by legislatures, courts, or dominant political or community groups.

337 U.S. at 4-5. Accordingly, the Court's low value speech categories require some external indicia of harm prior to allowing regulation of speech. For example, the Court recognizes that the government can punish advocacy of unlawful action only if such advocacy is "directed to inciting or producing imminent lawless action and . . . likely to incite or produce such action." *Brandenburg*, 395 U.S. at 447-48. The Court also permits officials to punish fighting words but only if they "have a direct tendency to cause acts of violence by the person to whom, individually" they are addressed. *Gooding*, 405 U.S. at 523. And the Court requires plaintiffs to show actual harm to reputation in order to recover damages for libel. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349 (1974) ("[T]he doctrine of presumed damages invites juries to punish unpopular opinion rather than to compensate individuals for injury sustained by the publication of a false fact.").

These carefully drawn standards are designed to preserve the "adequate breathing space" necessary for full exercise of First Amendment freedoms. *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 505 (1984) (describing the Court's review as designed "to confine the perimeters of any unprotected category within acceptably narrow limits in an effort to ensure that protected expression will not be inhibited"). In contrast, the comparatively amorphous common law requirements of IIED and the broad invasion of privacy standards advocated by Snyder infringe on First Amendment protections and chill constitutionally protected speech.

B. Common Law Standards that Impose Liability Based on the Emotional Impact of Speech Do Not Prevent Punishment of Constitutionally Protected Speech

The common law standards for IIED do not incorporate the external indicia of harm required by the Court. Liability based on common law standards for IIED would allow punishment of otherwise protected speech based solely on its emotional impact, i.e., because the message offends people. Similarly, recognizing Snyder's claim for a purely psychological invasion would erase the external indicium of harm in the common law standard for invasion of privacy by removing the requirement of a physical, spatial, or aural intrusion. Absent external indicia of harm, tort liability infringes on the First Amendment protection of freedom of expression by allowing censorship of unpopular speech.

1. IIED

Nothing in the elements of IIED – intent, outrageous conduct, or severe emotional harm – prevents imposing liability simply because the listener finds the expression at issue offensive or outrageous. *Falwell*, 485 U.S. 46. Emotional harm (even if physically manifested) is not one of the external indicia of harm historically recognized as a basis for restricting free speech rights.

The *Falwell* Court's rejection of an IIED exception to the First Amendment is consistent with the Court's longstanding practice of finding speech unprotected only if there are clear external indicia of harm. In *Falwell*, the Court expressly recognized that the common law standards for IIED did not sufficiently protect free speech values.[6] The Court explained that the "outrageousness" standard for imposing liability was so subjective as to "run[ ] afoul of our longstanding refusal to allow damages to be awarded because the speech in question may have an adverse emotional impact on the audience." *Falwell*,

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[6] Similar to the claim at issue in *Falwell*, Maryland's IIED tort requires a showing of intentional or reckless behavior that is also extreme and outrageous and which causes severe emotional distress. *See Pemberton v. Bethlehem Steel Corp.*, 502 A.2d 1101, 1115 (Md. Ct. Spec. App. 1986).

485 U.S. at 55. The Court also noted that this holds true even for speech motivated by hatred or ill-will. *Id.* at 53 (quoting *Garrison v. Louisiana*, 379 U.S. 64, 73 (1964)) ("Debate on public issues will not be uninhibited if the speaker must run the risk that it will be proved in court that he spoke out of hatred; even if he did speak out of hatred, utterances honestly believed contribute to the free interchange of ideas and the ascertainment of truth."). Thus, the Court has already recognized the inherent dangers of permitting liability under the subjective common law elements for IIED and has refused to do so for precisely those reasons.

2. Invasion of Privacy

The common law elements of invasion of privacy – intrusion into seclusion that is highly offensive to a reasonable person – generally protect against punishment of speech based on its emotional impact by recognizing only physical, spatial, or aural intrusions. *See, e.g.*, Restatement (Second) of Torts § 652B cmt. b (noting that intrusion requires physical intrusion into a place in which the plaintiff has secluded himself or "by the use of the defendant's senses, with or without mechanical aids, to oversee or overhear the plaintiff's private affairs"); *Schulman v. Group W Prods., Inc.*, 955 P.2d 469 (Cal. 1998) ("[P]laintiff must show the defendant penetrated some zone of physical or sensory privacy surrounding, or obtained unwanted access to data about, the plaintiff. The tort is proven only if the plaintiff had an objectively reasonable expectation of seclusion or solitude in the place, conversation or data source." (citing Restatement)); *Pospicil v. Buying Office, Inc.*, 71 F. Supp. 2d 1346, 1361 (N.D. Ga. 1999) (finding that state law did not support claim for intrusion into 'psychological sanctity' or an inner 'sphere of privacy' based on co-workers' offensive and vulgar comments).

However, Snyder and amici urge the Court to find an invasion of privacy because they find the Phelps' message abhorrent. Such an argument divorces the notion of "intrusion" from any concept of physical, spatial, or aural invasion as generally required at common law. 1 J. Thomas McCarthy, The Rights of Publicity & Privacy § 5:89 at 625 (2d ed. 2010) (noting that intrusion usually involves "some physical, not merely psychological" incursion into one's privacy, including invasion of space around a person via surveillance or stalking). That argument also conflates the first element of the tort, an intrusion, with the third element, that the intrusion be offensive to a reasonable person. In other words, Snyder argues that the Phelps' speech is intrusive *because* it is offensive to a reasonable person. As with allowing liability for offensive speech under IIED, that approach allows for punishment of the "emotive impact of speech" and amounts to regulation of speech based upon its message, a result that offends the most basic tenets of the First Amendment. *Johnson*, 491 U.S. at 412.

C. Free Speech Protections Require External Indicia of Harm for IIED or Invasion of Privacy Claims

Absent external indicia of harm, the approach Snyder advocates would subject offensive speech to tort liability simply because others have deemed the ideas to be false or pernicious. But the Court has recognized that "[h]owever pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries, but on the competition of other ideas." *Gertz*, 418 U.S. at 339. The Court should not cast aside its longstanding precedents protecting offensive messages from censorship simply because Snyder and others find the Phelps' speech particularly loathsome. *United States v. Eichman*, 496 U.S. 310, 318-19 (1990). Instead, the Court should protect against infringement of First Amendment rights by establishing clear standards for tort recovery under IIED and invasion of privacy where the claim is based on the speech. Amici recommend the following standards: (1) that speech be independently proscribable or that that Court require a false statement of fact made with actual malice for recovery under IIED and (2) that the Court require a physical, spatial, or aural intrusion for recovery under invasion of privacy claims.

1. Recommended IIED Standard

As a threshold matter, IIED liability may attach when speech is already independently proscribable, i.e., when it falls into one of the Court's existing categories of low value speech or involves speech that the Court has noted is otherwise unprotected. For example, if a speaker threatened another person, that expression could be subject to IIED liability. *See Black*, 538 U.S. 343. Or if an individual engaged in actionable sexual harassment in violation of existing discrimination law, such speech might be subject to IIED liability. *See R.A.V. v. City of St. Paul*, 505 U.S. 377, 389 (1992).[7]

However, when speech otherwise contributes to public discourse, the Court should continue to apply the *Falwell* standard for recovery under IIED: a false statement of fact made with actual malice. Such a standard is necessary to protect against content based censorship of speech and is consistent with the Court's framework of unprotected speech. By permitting liability based on an independently harmful act – i.e., an intentional or reckless falsehood – rather than on the audience's subjective emotional reaction to the speech, this standard provides a remedy for IIED while continuing to protect against content based censorship of expression.

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[7] Courts allowing IIED liability for speech generally look for objective indicia of harm. Indeed, the IIED cases Snyder cites permit IIED liability only after a showing of external indicia of harm. *See, e.g.*, *Alaska v. Carpenter*, 171 P.3d 41, 63 (Alaska 2007) (finding that derogatory speech about a matter of public importance cannot be the sole basis for an IIED claim because speaking on "a topic of public interest . . . cannot be considered outrageous conduct" but that speech encouraging harassment was not protected speech and may be the basis for IIED liability); *Van Duyn v. Smith*, 527 N.E.2d 1005, 1011-12 (Ill. App. Ct. 1988) (dismissing *Falwell* concerns after finding defendant had committed other tortious acts, including following the plaintiff).

First, the Court should continue to require a false statement of fact as a threshold determination for permitting a claim of IIED against otherwise protected speech. For speech about individuals that touches on matters of public concern, a provably false statement of fact is the first hurdle to damages of any kind. *See Milkovich v. Loraine Journal Co.*, 497 U.S. 1, 19-20 (1990) (requiring that "statement on matters of public concern . . . be provable as false before there can be liability under state defamation law"); *Greenbelt Coop. Publ'g Ass'n, Inc. v. Bresler*, 398 U.S. 6, 12-13 (1970).

The Court has applied the false statement of fact standard to IIED because it is an historically recognized and measurable external indicium of harm that prevents censorship in public debate. Indeed, the *Falwell* Court imposed this objective falsity standard after expressly rejecting an outrageousness standard as too subjective to be an adequate measure for punishment of speech. *Falwell*, 485 U.S. at 54-56. The falsity requirement is thus not merely a defamation standard but also a practical test that provides a concrete method for identifying unprotected speech. *Id.* at 56; *Time, Inc. v. Hill*, 385 U.S. 374, 387-88 (1967) (imposing false statement of fact with actual malice standard on invasion of privacy action due to fictionalization of name and likeness).

Second, the Court should continue to require actual malice before allowing an IIED claim for otherwise protected speech. Such a standard provides citizens with clear grounds for an IIED remedy while still protecting speech on matters of public concern. The Fourth Circuit decided this case without applying an actual malice standard because it found that as a threshold matter there was no provably false statement of fact. The Court should make clear, however, that the actual malice standard also applies in IIED cases.

The actual malice standard ensures that IIED does not become a mechanism for censorship of unpopular speech. Although a falsity standard aids in differentiating unprotected speech from offensive speech, an actual malice standard is necessary to fully protect speech pertaining to public issues. "[E]rroneous statement is inevitable in free debate." *Sullivan*, 376 U.S. at 271. Simply requiring a provably false statement does not prevent punishment of speech based upon a jury's hostile response to speech that is particularly offensive or controversial. As the Court has noted, "[f]ear of large verdicts in damage suits for innocent or merely negligent misstatement, even fear of the expense involved in their defense, must inevitably cause [speakers] to 'steer . . . wider of the unlawful zone,' . . . and thus 'create the danger that the legitimate utterance will be penalized.'" *Time*, 385 U.S. at 389 (citation omitted). A negligence standard combined with an amorphous IIED standard is simply insufficient to protect against the desire of outraged juries to punish speakers with whom they disagree.

By requiring a higher level of intent before exposing speakers to crushing tort liability, the actual malice standard is consistent with the Court's low value speech doctrine. *See, e.g.*, *Garrison*, 379 U.S. at 75 (distinguishing honest but "inaccurate" utterances from "calculated falsehood"). The Court has routinely required the higher intent standard of actual malice before allowing anything other than actual damages in libel cases. Even in cases involving private figure libel plaintiffs, the Court has required a showing of actual malice for awards of presumed and punitive damages, noting that such damages allow juries "to use their discretion selectively to punish expressions of unpopular views." *See, e.g.*, *Gertz*, 418 U.S. at 350. Unlike libel, IIED does not require an objectively identifiable harm to reputation; rather, it involves an amorphous emotional harm. Enabling a jury to assign damages for an emotional harm coupled with anything less than an actual malice standard allows the jury to do what they could otherwise accomplish with punitive damages: punish unpopular speech.

Falwell's false statement of fact with actual malice requirement is thus necessary to prevent content based censorship of any speech related to public discourse, not just speech related to public figures. *See also Milkovich*, 497 U.S. at 16 (recognizing that *Falwell* placed "limits on the *type* of speech which may be the subject of state [civil] actions") (original emphasis). As the *Falwell* Court recognized, "[a]t the heart of the First Amendment is . . . the fundamental importance of the free flow of ideas and opinions on matters of public interest and concern." *Falwell*, 485 U.S. at 50. By requiring a false statement of fact made with actual malice, the Court will continue its long tradition of protecting speech on matters of public concern, even in cases where that speech might have certain adverse effects on citizens. *Time*, 385 U.S. 389-90; *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 777 (1986) (finding that the First Amendment protected defamatory yet unproveably false statement of fact on a matter of public concern, even when the statement in question caused reputational harm). Anything less risks chilling legitimate speech on issues of public concern.

2. Recommended Invasion of Privacy Standard

The Court should continue to require a physical, spatial, or aural intrusion for invasion of privacy claims. The privacy tort of intrusion generally rejects recovery for purely psychological invasions. *See* 1 McCarthy § 5:89 at 625. That approach brings these tort claims within the Court's framework of unprotected speech by requiring external indicia of harm such as physical, aural, or spatial invasions. *See, e.g.*, Restatement (Second) of Torts § 652B cmt. b. Consistent with its existing captive audience jurisprudence, *see supra* Part II. A, the Court should not create special exceptions for the emotional impact of offensive messages, no matter how offensive the expression. Clear standards for speakers and courts alike are necessary because vague standards may be subject to arbitrary enforcement, or may perniciously chill protected expression. *Smith v. Goguen*, 415 U.S. 566, 572-73 (1974); *Grayned*, 408 U.S. at 108-09. Objective indicia of harm, such as physical, spatial, and aural intrusions, provide a clear set of criteria for identifying the limited circumstances where First Amendment protections give way to liability.

IV. CARVING OUT SPECIAL PROTECTION FOR FUNERALS CONTRADICTS FREE SPEECH PRINCIPLES

The dignified and solemn nature of funerals does not justify a special exception from constitutional protections of speech. The Court has recognized that even revered symbols such as the flag are subject to speakers' rights to express their opinions without fear of retaliation:

> The First Amendment does not guarantee that other concepts virtually sacred to our Nation as a whole – such as the principle that discrimination on the basis of race is odious and destructive – will go unquestioned in the marketplace of ideas. We decline, therefore, to create for the flag an exception to the joust of principles protected by the First Amendment.

Johnson, 491 U.S. at 417-18 (internal citation omitted). Approaching free expression analysis from any other vantage assumes "sacred" activities get special treatment – an assumption the Court has rejected. Rather, the Court's jurisprudence "sketches a sphere of constitutional immunity that extends to speech about public subjects, like religious faith or political belief or prominent persons, even though such speech violates the most elementary civility rules against exaggeration or vilification or excesses and abuses." Post, 103 Harv. L. Rev. at 629-30 (citations omitted); *see also W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 641-42 (1943) ("If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion or matters of public opinion.").

Creating new, special protection for funerals begs the question of what other locations or events should likewise be free from First Amendment protection, and opens the door to censorship of otherwise protected speech in many circumstances. *Phelps-Roper v. Nixon*, 509 F.3d at 487 (8th Cir. 2007) (quoting *Olmer v. City of Lincoln*, 192 F.3d 1176, 1182 (8th Cir. 1999)) ("Allowing other locations, even churches, to claim the same level of constitutionally protected privacy [as in the home] would . . . permit government to prohibit too much speech and other communication."). If speech at funerals is carved out from the Constitution's protections, nothing prevents the argument that other important and dignified occasions such as graduations, weddings, bar mitzvahs – or, for that matter, Veterans Day ceremonies – should be free of expression that offends others. Allowing society's standards of decency and civility to define exceptions to the First Amendment would eviscerate the constitutional protections of speech.

Recognizing tort liability for offensive speech, or creating a separate juridical category of tort liability for funeral protestors, would also allow actions against *any* protestors or speakers found to violate social norms, including the many other protestors at or near cemeteries and funerals. *See Legislative Hearing on H.R. 23, H.R. 601, H.R. 2188, H.R. 2963, H.R. 4843, H.R. 5037, and H.R. 5038, Before the Subcomm. on Disability Assistance and Memorial Affairs of the H. Comm. on Veteran's Affairs*, 109th Cong., 96-98 (2006) (Statement of John C. Metzler, Superintendent, Arlington National Cemetery) ("Because of our urban location in the heart of our Nation's Capital, Arlington National Cemetery frequently becomes a rallying point for groups wishing to express their opposing views and opinions particularly regarding our Nation's military policies."). Under these circumstances, large, discretionary damage awards in tort actions act like private fines levied by civil juries to punish speech that offends the majority. *See Gertz*, 418 U.S. at 349-50. The potential for crushing damages awards simply for engaging in political speech that others find contemptible would chill speakers and cast a "pall of fear and timidity . . . upon those who would give voice to public criticism." *Sullivan*, 376 U.S. at 278.

◆

CONCLUSION

Decades ago the Court noted that:

> In the realm of religious faith, and in that of political belief, sharp differences arise. In both fields the tenets of one man may seem the rankest error to his neighbor. To persuade others to his own point of view, the pleader, as we know, at times, resorts to exaggeration, to vilification of men who have been, or are, prominent in church or state, and even to false statement. But the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy.

Cantwell, 310 U.S. at 310. Amici law professors respectfully urge the Court to issue a ruling that preserves its longstanding jurisprudence protecting the rights of individuals to "persuade others to [their] own point of view," offensive though their message may be. *Id.*

Respectfully submitted,

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AMICUS
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BRIEF

No. 09-751

In the

SUPREME COURT OF THE UNITED STATES

ALBERT SNYDER
***Petitioner*,**

v.

FRED W. PHELPS, SR., *et al.*,
***Respondents*.**

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

AMICI CURIAE BRIEF OF THE THOMAS JEFFERSON CENTER FOR THE PROTECTION OF FREE EXPRESSION, THE MARION B. BRECHNER FIRST AMENDMENT PROJECT, NATIONAL COALITION AGAINST CENSORSHIP, THE PENNSYLVANIA CENTER FOR THE FIRST AMENDMENT

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STATEMENTS OF INTEREST OF AMICI CURIAE[1]

The Thomas Jefferson Center for the Protection of Free Expression is a nonprofit, nonpartisan organization located in Charlottesville, Virginia. Founded in 1990, the Center has as its sole mission the protection of free speech and press. The Center has pursued that mission in various forms, including the filing of *amicus curiae* briefs in this and other federal courts, and in state courts around the country. The Center is familiar with the facts and issues presented in this appeal having filed as *amicus curiae* when this case was before the United States Court of Appeals for the Fourth Circuit.

The Marion B. Brechner First Amendment Project ("Project") is a nonprofit, non-partisan organization located at the University of Florida in Gainesville, Florida. Directed by attorney Clay Calvert, the Project is dedicated to contemporary issues of freedom of expression, including current issues affecting freedom of information and access to information, freedom of speech, freedom of press, freedom of petition and freedom of thought.

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[1] Pursuant to S. Ct. R. 37.6, the *amici* state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief.

The National Coalition Against Censorship (NCAC), an alliance of more than 50 national non-profit literary, artistic, religious, educational, professional, labor, and civil liberties groups, educates and advocate on behalf of freedom of thought, inquiry, and expression. The positions advocated in this brief do not necessarily reflect the position of each of NCAC's participating organizations.

The Pennsylvania Center for the First Amendment ("PaCFA") was established by the Pennsylvania State University to promote awareness and understanding of the principles of free expression to the scholarly community, the media and the general public. Directed by attorney Robert D. Richards, the PaCFA's members publish books and scholarly articles on First Amendment topics. The PaCFA regularly tracks issues related to free expression, and research generated from those projects is presented at national conferences and in law journals.

SUMMARY OF ARGUMENT

As a father grieving the loss of a son who sacrificed his life serving his country, Albert Snyder deserves only sympathy and compassion. Nonetheless, members of the Westboro Baptist Church (hereinafter "the Phelps") expressed themselves in a manner that compounded Mr. Snyder's emotional anguish. In the limited context of the law, however, Mr. Snyder's suffering is tangential to the fundamental question of the case before the Court: Did the Phelps cause Albert Snyder to suffer cognizable claims of Intrusion Upon Seclusion and Intentional Infliction of Emotional Distress (IIED)? Viewed in this strictly legal context, the answer clearly is no; the facts necessary to establish the elements of these torts are simply not present.[2]

This elemental absence provides grounds for resolving the case without addressing whether the Phelps' expression is protected under the First Amendment. In such circumstances, this Court adheres to a self-imposed doctrine of judicial restraint by avoiding the adjudication of constitutional questions—even if properly presented by the record—if another ground exists to decide the case. *See Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring). Deemed as one of "the sixteen great maxims of judicial self-restraint" (Henry J. Abraham, *The Judicial Process* 348 (6th ed. 1993)), the doctrine of constitutional avoidance counsels that this case be resolved exclusively on the basis of Maryland tort law. Although evidentiary issues were not specifically raised in the questions presented by Mr.

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[2] The Phelps were also held liable for civil conspiracy by the district court. Because the unlawful activity required for this count was the substantive offense of Intrusion Upon Seclusion or IIED, the civil conspiracy claim must also be reversed. *See Green v. Washington Suburban Sanitary Comm'n*, 259 Md. 206, 269 A.2d 815, 824 (Md. 1970) (noting that "[a] civil conspiracy is a combination of two or more persons by an agreement or understanding to accomplish an unlawful act").

Snyder, this Court has plenary power to consider any issue evident from the record. Sup. Ct. R. 24(1)(a). In this case, the record reveals that the Phelps' actions do not meet the elements of the alleged torts. Arriving at this conclusion does not require this Court to second-guess the lower court's factual findings. Indeed, the facts of this case are largely undisputed. *See Snyder v. Phelps*, 580 F.3d 206, 211 (4th Cir. 2009). Only the district court's conclusions of law are at issue.

A review of the record makes it apparent that the district court misapplied Maryland law to the facts presented. The doctrine of constitutional avoidance, coupled with the determination that the Phelps did not commit the torts alleged by Mr. Snyder, makes the sufficiency of the evidence issue especially deserving of this Court's review.

The availability of a non-constitutional ground on which to resolve this case does not vitiate the Fourth Circuit's conclusion that the Phelps' expression is protected under the First Amendment. Indeed, were it necessary for this Court to address the First Amendment issue, *amici* would fully endorse the Fourth Circuit's analysis. The availability of a non-constitutional ground, however, makes such an analysis unnecessary. With regard to the specific torts underlying the challenged judgment, two deceptively simple principles bind the inquiry. On the one hand, both Maryland law and the United States Constitution permit recovery for injuries suffered as a result of harmful expression.

Equally clear, on the other hand, is the severely limited scope of such remedies essential to maintain consistency with First Amendment freedoms. Thus, even if the First Amendment is not the basis for deciding this case, it nonetheless serves as a constitutional backdrop for the Court's analysis.

The need for careful appellate review is inescapable in cases involving messages that most citizens find deeply offensive and profoundly unpatriotic. This Court has consistently demanded in such cases that appellate courts review the circumstances de novo. *See Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 505 (1984). Such rigorous scrutiny is vital "because the reaches of the First Amendment are ultimately defined by the facts it is held to embrace," so a reviewing court must determine "whether a given course of conduct falls on the near or the far side of the line of constitutional protection." *Id.*; *see also Hurley v. Irish-Am. Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557, 567 (1995). A case such as this one, in which the message is almost universally abhorrent, is precisely the kind that calls for the most sensitive and rigorous review.

ARGUMENT

I. NEITHER THE FUNERAL PROTEST NOR THE POSTING OF THE "EPIC" CONSTITUTED INTRUSION UPON SECLUSION UNDER MARYLAND LAW.

The district court correctly itemized the elements of Intrusion in Jury Instruction No. 18: "(1) An intentional (2) intrusion or prying upon (3) something which is and is entitled to be private (4) in a manner which is highly offensive to a reasonable person." Vol. XII p. 3110.[3] Under Maryland law, the facts presented at trial do not establish a viable claim under this tort.

A. As a matter of Maryland law, an Intrusion plaintiff cannot claim a right to seclusion in something widely known by others.

The critical issue in Intrusion claims is "whether there has been an intrusion into a private place or the invasion of a private seclusion that the plaintiff has thrown about his person or affairs." *Furman v. Sheppard*, 744 A.2d 583, 586 (Md. Ct. Spec. App. 2000); *see also Pemberton v. Bethlehem Steel Corp.*, 502 A.2d 1101, 1116 (Md. Ct. Spec. App. 1986). Intrusion plaintiffs must have reasonable expectations of privacy in the location or information allegedly intruded upon. *See Furman*, 744 A.2d at 586; *Trundle v. Homeside Lending, Inc.*, 162 F.Supp.2d 396, 440 (D. Md. 2001).

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[3] Consistent with both Petitioner's and Respondents' briefs, references to the record are contained in the Appellants' Appendix submitted to the Court of Appeals.

Under Maryland law, Intrusion plaintiffs may not claim a reasonable expectation of privacy in publicly available information. In *Hollander v. Ludbow*, for example, an Intrusion claim was brought against a defendant for disclosing that the plaintiff was a partner in a competing firm. 351 A.2d 421 (Md. 1976). The court rejected the claim, holding there was no reasonable expectation of privacy in the information because it was contained in the formal partnership documents on file in the public records office. *Id.* at 428.

Maryland law further posits that a reasonable expectation of privacy does not exist in publicly visible places. *See Furman*, 744 A.2d at 586. In *Furman*, surveillance conducted while the plaintiff was on a yacht in a public waterway was not an actionable Intrusion, even though defendant was trespassing on private property, because "[t]here is no liability for observing him in public places since he is not then in seclusion." *Id.* Similarly, in *Barnhart v. Paisano Publications, LLC*, 457 F.Supp.2d 590 (D. Md. 2006), the plaintiff had neither a reasonable expectation of privacy nor a valid Intrusion claim for semi-nude photographs taken of her at a public event because anyone could have seen her and the photographs constituted nothing more than "giving publicity to what is already public . . . ." *Id.* at 593 (citations omitted). And finally, in *Solomon v. National Enquirer, Inc.*, 1996 W.L. 635384 (D. Md. June 21, 1996), a plaintiff photographed in her window with the curtains open did not have a reasonable expectation of privacy for purposes of Intrusion because she did nothing to "conceal herself from uninvited eyes" while in full view of the general public. *Id.* at *3.

The evidence before the district court left no doubt that information about Matthew Snyder's funeral service was publicly and freely available. "Obituary notices were placed in local newspapers providing notice of the time and location of the funeral." *Snyder v. Phelps,* 533 F.Supp.2d 567, 571 (D. Md. 2008). Thus, the Phelps did not publicize either the news of Matthew Snyder's death or the time and location of his funeral service. *Cf. Showler v. Harper's Mag. Found.*, 222 F. App'x 755, 764 (10th Cir. 2007) (magazine's publication of a photo taken at a funeral showing the open casket of a soldier killed in the Iraq war was not an intrusion because a newspaper previously published details that the funeral service was open to the public).

Given that the obituary notices did not exclude members of the public from attending the service, the Phelps cannot be held responsible for the fact that the church was filled, thereby denying Mr. Snyder the right "to be let alone" during the service. *See Klipa v. Bd. of Educ.*, 460 A.2d 601, 606 (Md. Ct. Spec. App. 1983) (quoting William Prosser, *Handbook of the Law of Torts* 832 (3d ed. 1964)).

Under Maryland law, a plaintiff in a public place cannot claim to be in seclusion. *Furman*, 744 A.2d at 587.

Even if Mr. Snyder had a right of seclusion within the confines of the church, that right did not extend to public spaces out of sight of the church. The Phelps' protest took place 1000 feet away from the church. Vol. XV p. 3758 (Defendants Exhibit 2, aerial photo of area with distance between protest and church marked). In finding that a protest near–but not at–a funeral service and unseen by the plaintiff constitutes Intrusion Upon Seclusion, the district court essentially declared that Mr. Snyder's right to seclusion is geographically boundless. Indeed, there is nothing in the lower court's reasoning that would preclude a finding of liability if the Phelps' protest had taken place 1000 miles from the funeral service. Such a prospect was enhanced by the court's determination that the intrusion element could be satisfied by turning on a television set. "A reasonable jury could find... that when Snyder turned on the television to see if there was footage of his son's funeral, he did not 'choose' to see close-ups of the defendants' signs and interviews with Phelps and Phelps-Roper, but rather their actions intruded upon his seclusion." *Snyder,* 580 F.3d at 581.

This analysis confuses an intrusion with the receipt of undesirable information. Mr. Snyder never observed the actual protest. He only saw a television report on the protest filtered (for better or worse) through the eyes of a television camera crew.

> It was undisputed at trial that Defendants complied with local ordinances and police directions with respect to being a certain distance from the church. Furthermore, it was established at trial ***that Snyder did not actually see the signs*** until he saw a television program later that day with footage of the Phelps family at his son's funeral.

Id. at 572 (emphasis added). The act of turning on a television set of his own volition represents Mr. Snyder's willingness to accept whatever content was on the channels he selected. The district court's analysis to the contrary transforms every television viewer in Maryland into a potential Intrusion plaintiff anytime they view something that they find personally offensive.

B. Under Maryland law, a non-disruptive protest that is neither seen nor heard by a plaintiff cannot constitute an intrusion for the purpose of an Intrusion claim.

The plain meaning of Instruction No. 18 is that the intent to intrude or pry is insufficient to find liability unless it led to an *actual act* of intrusion or prying. At a minimum, therefore, legally-actionable "intrusion" pre-supposes entry into a physical space or access to private information.

The facts presented at trial conclusively establish that the Phelps did not intrude upon the funeral service either physically or audibly. At all times, the Phelps' protest occurred in a public place, designated by local police, approximately 1000 feet from the church where the service was held. Vol. XV p. 3758 (Defendants Exhibit 2, aerial photo with distance between protest and church). Moreover, it was impossible to observe the Phelps' protest from the church because the view was obstructed by St. John's Catholic School. Vol. VII p. 2079 (testimony of Albert Snyder); *see also* Vol. XV p. 3758 (Defendants' Exhibit 2, aerial photo of grounds); Vol. XV p. 3795 (Defendant's Exhibit 19, DVD with footage of church and picketing area). The fact that the Phelps used no sound amplification—combined with the distance and physical obstructions between the protest and the church—prevented any sounds from the protest being heard in the church. Vol. VIII p. 2165. Nor were the Phelps even seen by many driving to the service because their protest was several hundred feet away from the processional route. Vol. X p. 2640 (testimony of Father Dobranski). Although Mr. Snyder testified that he observed the Phelps' signs for a moment from his car on his way to the funeral, he conceded that the signs were too far away to read. Vol. VII p. 2080 (testimony of Albert Snyder). Given that Mr. Snyder never saw or heard the actual protest, his Intrusion claim based on the protest lacks proof of the requisite act of an intrusion.

C. Under Maryland law, liability for Intrusion Upon Seclusion is based on the offensiveness of the manner of intrusion, not the offensive content of speech.

An intentional intrusion "in a manner which is highly offensive to a reasonable person" is the fourth and final element of an Intrusion claim. Vol. XII p. 3010. The plain meaning of the instruction centers liability on the ***manner*** of intrusion, not the ***content*** of the speech. ***See Trundle,*** 162 F. Supp. 2d 396, 401 (D. Md. 2001); ***see also Pemberton***, 502 A.2d at 1116. The Phelps' message may have been offensive to a reasonable person, but peaceful, non-disruptive and lawful picketing is a time-honored ***manner*** of expressing one's views on political and social issues. ***See Pleasant Grove City v. Summum***, 129 S. Ct. 1125, 1132 (2008) (citations omitted)

The fact that Mr. Snyder brought legal claims only against the Phelps and not the far greater number of highly visible Patriot Guard and student demonstrators there to honor Matthew Snyder illustrates that the content of the Phelps' speech, and not the manner of their alleged intrusion, is at the heart of the claim. While Mr. Snyder's choice of defendants is certainly understandable from an emotional point of view, the elements of an Intrusion tort are not met by offensive speech alone.

Though conceivably it might have been reasonable to consider an Intrusion claim had there been an actual disruption of the service, this is not what occurred. As understandable as it might be to desire to provide legal redress to Mr. Snyder in his time of grief, the requisite elements of an Intrusion Upon Seclusion claim are not present in the facts of the Phelps' protest.

D. The posting of a written statement on the Internet that shares no private information about another person does not constitute an Intrusion Upon Seclusion.

Many of the foregoing facts about the protest that thwart an actionable Intrusion claim apply with equal force to the posting of the "epic" on the Westboro Baptist Church's website, such as the fact that Mr. Snyder came upon the information of his own volition:

> In posting the "epic," the Phelps did not do anything to direct it to Snyder's attention ... Instead, Snyder learned of the "epic" during an Internet search, and upon finding it he chose to read it. By doing so, any interference with Snyder's purported interest in seclusion was caused by Snyder himself rather than the Phelps.

Snyder, 580 F.3d 206, 231 (4th Cir. 2009) (Shedd, J., concurring).

In reviewing the jury's findings regarding the "epic," the district court ruled, "[t]here was sufficient evidence in the trial record for a reasonable jury to conclude that Defendants' conduct unreasonably invaded Snyder's privacy and intruded upon his seclusion during a time of bereavement." *Snyder,* 533 F. Supp. 2d at 581. Under the district court's analysis, therefore, *the Phelps intruded* upon Mr. Snyder's privacy only because *Mr. Snyder chose to access* the Westboro website. Such Jabberwockian reasoning eviscerates the tort's requirement of an intrusion. A plaintiff cannot willingly seek out information and then claim his seclusion was intruded upon. The statements contained in the "epic" were certainly despicable, but they were not thrust upon Mr. Snyder against his will.

Moreover, as previously noted, a plaintiff who alleges Intrusion must have a reasonable expectation of privacy in the arena that is the target. *Hollander,* 351 A.2d 421 (Md. 1976). For obvious reasons, Mr. Snyder had no expectation of privacy in the Westboro website. Nor could he have had any expectation of privacy in the content of the so-called "epic" setting forth the Phelps' religious and political views as well as their admittedly hurtful but highly personal beliefs as to why Matthew Snyder died. Only something "which is and is entitled to be private" can serve as the basis for an Intrusion claim. Perhaps Mr. Snyder might have had a reasonable expectation of privacy in some of the factual information contained in the posting if it had not already been widely known but such was not the case here. In fact, four weeks prior to the posting, the factual information contained in the "epic" was made available through Matthew's obituary and the "two or three" press interviews given by Mr. Snyder about Matthew prior to the funeral service. Vol. VIII p. 2150 (testimony of Albert Snyder). Under Maryland law, a plaintiff does not have a reasonable expectation of privacy in information that has already been made publicly available. *See Furman*, 744 A.2d at 587.

The district court specifically held that the "epic" revealed no private information. Indeed, it was on that basis that the district court granted the Phelps' motion for summary judgment on the Publicity Given to Private Life claim. *Snyder*, 533 F.Supp.2d at 573. Given that determination, the district court erred in not also granting the Phelps summary judgment on the Intrusion claim, at least as far as it pertained to the "epic." Under Maryland law intrusion and publicity claims both "require the invasion of something secret, secluded or private pertaining to the plaintiff." *Hollander*, 351 A.2d at 427. If Mr. Snyder had no reasonable expectation of privacy for the purposes of the Publicity claim, he could have no privacy interest in the exact same information for the purposes of the Intrusion claim.

II. RULING THAT THE PHELPS' EXPRESSION WAS INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS CONSTITUTED REVERSIBLE ERROR.

In the Court's Instruction No. 19, the jury was informed that the elements of IIED were "(1) that the Defendants' conduct was intentional or reckless; (2) that the conduct was extreme and outrageous; (3) that the conduct caused emotional distress to the Plaintiff; and (4) that emotional distress was severe." Vol. XII p. 3011. Each element of the claim "must be pled and *proved* with specificity." *Foor v. Juvenile Servs. Admin.*, 552 A.2d 947, 959 (1989) (emphasis added). A detailed review of Maryland's IIED standards reveals that neither the Phelps' protest nor their subsequent website posting of the "epic" constitute "extreme and outrageous" conduct.

A. Maryland tort law imposes a particularly high standard for recovery of Intentional Infliction of Emotional Distress.

Under Maryland law, a defendant is not liable for IIED for exercising his legal rights in a permissible way. *See Young v. Hartford Accident & Indem. Co.*, 492 A.2d 1270, 1278 (Md. 1985). Recovery for IIED is a rare and extreme remedy "meted out sparingly, its balm reserved for those wounds that are truly severe and incapable of healing themselves." *Figueiredo-Torres v. Nickel*, 584 A.2d 69, 75 (Md. 1991) (quoting *Hamilton v. Ford Motor Credit Co.*, 502 A.2d 1057, 1065 (Md. 1986)). In fact, liability for IIED in Maryland is found so infrequently that twenty years after the tort was first recognized there had only been three instances in which IIED claims were upheld. *Penhollow v. Bd. of Comm'rs for Cecil County*, 695 A.2d 1268, 1285 (Md. Ct. Spec. App. 1997) (citing *Batson v. Shiflett*, 602 A.2d 1191, 1217 (Md. 1992)). Five years later, the Maryland District Court reiterated the rarity of a finding of liability by pointing out that

> [T]here is a surfeit of cases in which allegations of the tort have failed to clear the dispositive motion stage . . . . For a ***sample*** of the ***reported*** cases in this district decided ***only within the last year***, *see, e.g.*, *Silvera v. Home Depot U.S.A., Inc.*, 189 F.Supp.2d 304 (D.Md. 2002); *Carson v. Giant Food, Inc.*, 187 F.Supp.2d. 462 (D.Md. 2002); *Green v. Wills Group, Inc.*, 161 F.Supp.2d. 618 (D.Md. 2001); *Collier v. Ram Partners, Inc.*, 159 F.Supp.2d. 889 (D. Md. 2001); *Rich v. United States*, 158 F.Supp.2d 619 (D.Md. 2001); *Vincent v. Prince George's County, MD*, 157 F. Supp.2d 596 (D.Md. 2001); *White v. Maryland Transp. Authority*, 151 F.Supp.2d 651 (D.Md.2001); *Robinson v. Cutchin*, 140 F.Supp.2d 488 (D.Md.2001).

Arbabi v. Fred Meyers, Inc., 205 F.Supp.2d 462, 466 (D. Md. 2002) (emphasis in original). The tort's requirement of "extreme and outrageous" conduct also imposes a particularly high barrier to recovery: For conduct to meet the test of "outrageousness" it must be "'so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.'" *Harris v. Jones*, 380 A.2d 611, 614 (Md. 1977) (quoting Restatement (2d) of Torts § 46, cmt. d (1965)). This barrier "exists to screen out claims amounting to 'mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities' that simply must be endured as part of life." *Batson*, 602 A.2d 1191, 1216 (Md. 1992) (citations omitted).

Consistent with a literal interpretation of this tort, Maryland courts have upheld IIED liability in cases involving extreme and outrageous *conduct,* not speech. *See e.g., Figueiredo-Torres,* 584 A.2d 69 (Md. 1991) (a marriage counselor had sexual relations with the wife of a patient he was counseling); *B.N. v. K.K.*, 538 A.2d 1175 (Md. 1998) (a physician had sexual relations with a nurse without telling the nurse that he had herpes); *Young,* 492 A.2d 1270 (a worker's compensation insurer insisted that a claimant submit to a psychiatric examination in order to harass the claimant and force her to abandon the claim). A common feature among the foregoing cases (and one absent from the instant case) is a prior relationship between the parties that placed the defendant in a unique position of power over the plaintiff. "In cases where the defendant is in a peculiar position to harass the plaintiff, and cause emotional distress, his conduct will be carefully scrutinized by the courts." *Harris,* 380 A.2d 611, 615

(Md. 1977); *cf. Borchers v. Hrychuck,* 727 A.2d 388 (Md. 1999) (holding that a pastor who had sexual relations with a congregant in the course of marriage counseling did *not* amount to IIED since he was not in an officially-sanctioned treatment relationship with the defendant, distinguishing the situation from *Figueiredo-Torres*).

In contrast, Maryland courts do not appear to have upheld liability in IIED cases where speech was the alleged cause of the distress. For example, even defamatory speech does not automatically translate to IIED liability. *Batson,* 602 A.2d 1191, 1217 (Md. 1992) (defamatory statements made in connection with a labor dispute) ("[T]hough we have held that petitioners' statements were defamatory, this conduct in no way satisfies our exacting standard for 'extreme and outrageous conduct.'").

Derogatory statements made in the workplace regarding gender, religion, national origin and race over a period of five years did not survive a motion for summary judgment on an IIED claim. *Arbabi,* 205 F.Supp.2d 462, 465-66 (D. Md. 2002) ("As inappropriate and repulsive as workplace harassment is, such execrable behavior almost never rises to the level of outrageousness...as to reach the high threshold invariably applicable to a claim of intentional infliction of emotional distress under Maryland law.")

Nor was it "extreme and outrageous" conduct for a husband to lie to his wife for twenty years that he had obtained a divorce from a previous marriage. *Vance v. Vance*, 408 A.2d 728 (Md. 1979); *see also Bongam v. Action Toyota, Inc.*, 14 F. App'x 275 (Md. 2001) (car salesman who referred to a black customer as a "nigger" and breached an agreement to sell a car did not meet the outrageous conduct requirement of IIED); *Collier v. Ram Partners, Inc.*, 159 F.Supp.2d 889 (D. Md. 2001) (an employer's persistent use of racial slurs and threats of bodily harm to an employee did not rise to level of outrageousness). These cases illustrate the very high legal threshold imposed by the "extreme and outrageous" standard in IIED claims, particularly those stemming from speech-related conduct.

B. The posting of lawful statements of opinion on a website does not constitute "extreme and outrageous" conduct merely because the statements may be offensive.

The district court's finding that the posting of the "epic" on the Westboro Church's website constituted "extreme and outrageous" conduct is unwarranted under Maryland law and represents an unprecedented expansion of this tort. The Phelps posting of the "epic" on their website was entirely lawful. A defendant is not liable for IIED in Maryland for exercising his legal rights in a permissible way. In *Young v. Hartford Accident & Indem. Co.*, the plaintiff filed IIED and Negligence claims against her insurance company for the emotional stress caused by the insurer's demand that she submit to an additional psychiatric examination in order to continue receiving her disability benefits. 492 A.2d 1270, 1278 (Md. 1985). The trial court dismissed the insured's IIED claim. On appeal, the Maryland Court of Appeals affirmed the trial court's IIED decision because it was the insurance company's legal right to insist upon the evaluation. In reaching this conclusion, the court relied upon the Restatement's position that an IIED defendant is "never liable...where he has done no more than to insist upon his legal rights in a permissible way, even though he is well aware that such insistence is certain to cause emotional distress." *Id.* (citing Restatement (2d) of Torts § 46 cmt. g (1965)).

Similarly, a defendant's summary judgment motion on an IIED claim was granted in a case involving a man calling his live-in fiancé a "bitch," "whore," and a "one-breasted woman" while she was recovering from breast cancer treatments in an attempt to get her to move out of his house. *Miller v. Ratner*, 688 A.2d 976, 978 (Md. Ct. Spec. App. 1997),

> The verbal language directed to Ms. Miller, and the conduct was solely verbal, although it included threats, was for the purpose of pressuring appellant to leave Warren's house, where, ***regardless of the morality of his position***, she had no legal right to remain. Considering that the appellees ***had the legal right to require appellant to leave,*** we do not perceive their verbal actions alone to be, as nauseating as

> they are if true, of such egregiousness so as to satisfy the elements of the tort.

Id. at 996 (emphasis added).

The act of posting one's opinion on the Internet is today clearly an accepted act performed widely by an inestimable number of speakers around the world. While the Phelps' opinions may be offensive, the act of posting them is not extreme and outrageous. Moreover, the statements made in the "epic" do not fall under any of the categorical exceptions to First Amendment protection such as obscenity, incitement to violence or fighting words. *See Snyder*, 580 F.3d at 224-226. The "epic" did not contain personal information or other material obtained by force or without permission. *Cf. Mitchell v. Baltimore Sun Co.*, 883 A.2d 1008 (Md. Ct. Spec. App. 2005). Disclosure did not violate a pre-existing duty or promise between the Phelps and Mr. Snyder. *Cf. Cohen. v. Cowles Media Co.*, 501 U.S. 663 (1991). Nor did it propose to commit an illegal act, *(cf. Rice v. Paladin Enters.*, 128 F.3d 233 (4th Cir. 1997)), or unlawfully make use of the intellectual property of another. *Cf. Zacchini v. Scripps-Howard Broadcasting, Co.*, 433 U.S. 562 (1977). To allow liability for the posting of the "epic" would represent an expansion of IIED liability that would severely chill the exercise of lawful expression on the Internet.

C. The Phelps' protest in the vicinity of the funeral service was not extreme and outrageous conduct and was not the cause of Mr. Snyder's emotional distress.

For myriad reasons, it was reversible error to find that the Phelps' protest near the funeral service constituted "extreme and outrageous" conduct. First, as with the posting of the "epic," the Phelps' protest was entirely lawful and therefore did not constitute "extreme and outrageous" conduct under Maryland law. *See Young*, 492 A.2d 1270 (Md. 1985). Peaceful, non-disruptive picketing is a time-honored means of expressing one's views on political and social issues. *See Pleasant Grove*, 129 S. Ct. 1125, 1132 (2008) (citations omitted).

Second, the messages displayed on the signs did not mention Matthew Snyder's name and, like the "epic," did not fall under any of the exceptions to First Amendment protection. *See Snyder*, 580 F.3d at 222-224. Further, "as utterly distasteful as these signs were, they involve matters of public concern, including the issue of homosexuals in the military, the sex-abuse scandal within the Catholic Church, and the political and moral conduct of the United States and its citizens." *Id.* at 222-23. That the signs addressed matters of public concern should inform the analysis of whether the Phelps' conduct was "extreme and outrageous." Indeed, this Court has expressly recognized that the "outrageousness" standard of the IIED tort is problematic when applied to speech that involves matters of public concern:

> "Outrageousness" in the area of political and social discourse has an inherent subjectiveness about it which would allow a jury to impose liability on the basis of the jurors' tastes or views, or perhaps on the basis of their dislike of a particular expression. An "outrageousness" standard thus runs afoul of our longstanding refusal to allow damages to be awarded because the speech in question may have an adverse emotional impact on the audience.

Hustler Magazine v. Falwell, 485 U.S. 46, 55 (1988).

Third, the Phelps took deliberate steps to ensure that their protest would not disrupt the service. Rather than simply appearing on the day of the funeral service, the Phelps gave advance notice to local law enforcement, providing them with the time and opportunity to make arrangements for the protest. Vol. XV p. 3776 (Phelps' letter to Officer Spaulding). After their arrival in Maryland, the Phelps' obeyed all laws, regulations and directions. Vol. VII pp. 2285-86 (testimony of Major Thomas Long). Of particular relevance, the Phelps agreed to protest in a police-designated location that could neither be seen nor heard from the church—something they were not obligated to do. Many of the Patriot Guard funeral demonstrators were allowed to form a "tunnel" immediately outside the church through which Mr. Snyder passed in order to access the service. Vol. VII p. 2080 (Testimony of Albert Snyder); Vol. XV p. 3762 (Defendants' Exhibit 42, photo of Patriot Guard outside church). The undoubted basis for this disparate treatment was the message expressed by the Phelps. While content-neutral and reasonable restrictions on time, place, and manner may have been permissible, restrictions based on viewpoint are prohibited under the First Amendment. *See Carey v. Brown*, 447 U.S. 455, 463 (1980). Realizing that the many other demonstrators were not similarly restricted, the Phelps would have been within their constitutional rights to move beyond their segregated space to an area closer to the church (which they chose not to do). Finally, the Phelps took the ultimate step to ensure the funeral service would not be disrupted by ending their protest just as the service was beginning. Vol. VIII pp. 2285-86 (testimony of Major Long). While one might argue that picketing which actually disrupts a funeral service constitutes extreme and outrageous conduct, such an argument is not available in the context of this case.

Yet even if the Phelps' protest could be considered "extreme and outrageous" conduct, it was not the cause of Mr. Snyder's emotional distress for the simple reason that he neither saw or heard it. The true source of Mr. Snyder's emotional pain was a *television news report* on the protest that he watched after the funeral service. *See Snyder v. Phelps*, 533

F.Supp.2d 567, 572 (D. Md. 2008). The Phelps had no control over the broadcaster's independent and constitutionally protected editorial decision to cover and broadcast their edited version of the protest. The Phelps were only responsible for providing some of the news report's content.

If a television news report of a political protest can serve as the basis for an IIED claim, then freedom of the press would be in jeopardy because the television station that covered the protest would be potentially as culpable as the Phelps. Knowing that Mr. Snyder had not seen the Phelps' protest because he was attending the funeral service, the broadcaster would be aware of both the high probability that Mr. Snyder would witness the protest only through the news report and that seeing it would cause him severe emotional distress. In such a context, it is reasonable to believe that a jury would conclude that it was "extreme and outrageous" for the television broadcaster to give the Phelps exactly what they wanted— a platform allowing their highly offensive speech to reach a much greater audience. Of course such a basis for potential liability of a television station seems unlikely – though explaining why the message-creator is liable while the messenger is immune is a daunting task, and suggests the hazards of such a standard as the one on which this appeal focuses.

To hold a speaker legally accountable for IIED in so public a setting invites a nearly limitless scope of tort liability—a result clearly at odds with

Maryland precedent requiring recovery for IIED claims to be "meted out sparingly, its balm reserved for those wounds that are truly severe and incapable of healing themselves." *See Figueiredo-Torres*, 584 A.2d 69, 75 (Md. 1991) (citations omitted). "Although reasonable people may disagree about the appropriateness of the Phelps' protest, this conduct simply does not satisfy the heavy burden required for the tort of intentional infliction of emotional distress under Maryland law." *Snyder*, 580 F.3d 206, 232 (4th Cir. 2009) (Shedd, J., concurring).

III. THE DOCTRINE OF CONSTITUTIONAL AVOIDANCE COUNSELS THAT THIS COURT REVIEW THE SUFFICIENCY OF THE EVIDENCE TO DETERMINE IF THERE ARE NON-CONSTITUTIONAL GROUNDS TO DECIDE THE CASE.

A. The Court of Appeals erred in not adhering to the doctrine of constitutional avoidance.

Endorsed by this Court over 100 years ago, the doctrine of constitutional avoidance is a fundamental rule of judicial restraint. *See Burton v. U.S.,* 196 U.S. 283 (1905); *see also Ashwander*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring); Henry J. Abraham, *The Judicial Process* 348 (6th ed. 1993). This prudent approach to adjudicating constitutional issues developed in part out of concern for the potential threat to our democratic system of government by having the non-elected federal judiciary too quickly declaring unconstitutional the acts of the democratically-elected Congress. *See* Michael L. Wells, ***The "Order-of-Battle" in Constitutional Litigation***, 60 SMU L. REV. 1539, 1548-1549 (2007). "The Court developed, for its own governance in the cases confessedly within its jurisdiction, a series of rules under which it has avoided passing upon a large part of all the constitutional questions pressed upon it for decision." ***Ashwander***, 297 U.S. at 346. Included among those rules:

> The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of. This rule has found most varied application. Thus, if a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter.

Id. at 347. *See also **Elk Grove Unified Sch. Dist.** v. **Newdow***, 542 U.S. 1 (2004); ***Huffman** v. **Pursue, Ltd.***, 420 U.S. 592 (1975); ***Maryland** v. **EPA***, 530 F.2d 215 (4th Cir. 1975) (vacated); ***NAACP** v. **City of Annapolis***, 133 F. Supp. 2d 795, 812, n. 24 (Md. 2001).

Although the doctrine of constitutional avoidance initially developed in the context of acts of

Congress, similar concerns exist when federal courts rule on issues that are in the province of the states to decide. "The seriousness of federal judicial interference with state civil functions has long been recognized by this Court. We have consistently required that when federal courts are confronted with requests for such relief, they should abide by standards of restraint that go well beyond those of private equity jurisprudence." *Huffman*, 420 U.S. 592, 603 (1975).

The Fourth Circuit majority's refusal to review the sufficiency of the evidence created the risk of usurping Maryland's authority to set the boundaries for imposing civil liability within the state. While that harm was averted by the appellate court's finding that the Phelps' expression was constitutionally protected, such would not have been the case had the appellate court came to the opposite conclusion. As previously noted, a person is not liable for IIED in Maryland where he has insisted upon his legal rights in a sanctioned manner, even when he is aware his actions are certain to cause someone emotional distress. *Young*, 492 A.2d 1270, 1278 (Md. 1985). Since at the time of the protest Maryland had not yet followed the example of approximately forty other states by enacting a statute restricting funeral protests, the Phelps were within their legal rights to protest where they did.[4]

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[4] Maryland has since passed a statute regulating funeral protests; however, even under the statute the Phelps' conduct is still immune from liability. Md. Code Crim. Law § 10-205(c) (2006) ("A person may not engage in picketing activity within

If a stricter standard is deemed necessary to harness activities such as protests *near* funerals, it should be left to the individual states to decide. Had the Court of Appeals determined that the Phelps' expression was unprotected, such a ruling effectively would have endorsed a federal expansion of Maryland tort liability beyond the well-established limits previously set by Maryland state courts. Avoiding federal judicial interference with state civil functions is one of the goals served by the doctrine of constitutional avoidance. *Huffman*, 420 U.S. at 603.

In addition, refusing to address a case-dispositive evidentiary issue simply because the parties did not raise it on appeal would "turn the principle of constitutional avoidance on its head; rather than avoiding unnecessary constitutional issues, we allow the parties to structure the case in order to force ... [courts] to reach constitutional issues." *See Snyder*, 580 F.3d at 227 (Shedd, J., concurring) (citing *U.S. Nat. Bank of Oregon v. Indep. Ins. Agents of Am.*, 508 U.S. 439, 447 (1993)(noting that "the contrary conclusion would permit litigants, by agreeing on the legal issue presented, to extract the opinion of a court on hypothetical acts of Congress or dubious constitutional principles... ").

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100 feet of a funeral . . . that is targeted at one or more persons attending the funeral . . . .").

B. The sufficiency of the evidence claim was addressed by the Court of Appeals and properly preserved for review by this Court.

Although the Fourth Circuit correctly determined that the Phelps had properly challenged the sufficiency of the evidence in the district court, the appeals panel puzzlingly held that the church "abandoned that contention on appeal" and therefore "voluntarily waived the sufficiency issue." *Snyder*, 580 F.3d at 216. In fact, a review of the record reveals that the Phelps made several challenges to the sufficiency of the evidence in their appeal. In their brief to the Court of Appeals, the Phelps claimed that Mr. Snyder "had no privacy right in his son's funeral or his own mourning under *the circumstances of this case*." Brief of the Appellants at 14, *Snyder*, 580 F.3d 206 (4th Cir. 2009) (No. 08-1026). The difference between this claim and an explicit "sufficiency of the evidence" claim is one of semantics, not substance. The reference to "the circumstances of the case" obviously addresses solely the adequacy of the evidence as it applied to the only privacy-based tort still at issue.

To buttress their claim that the circumstances of the case presented no valid privacy interest, the Phelps cited several examples of similar factual situations in which this Court and lower courts have determined that a right of privacy does not exist. *Id.* at 14-16. The Phelps' brief also notes a case in which a court found that a right of privacy does not exist in the specific context of a public funeral. *Id.* at 15-16.

The clear purpose of highlighting these cases was to demonstrate by contrast that the evidence presented here failed to constitute the elements of the only torts at issue on appeal.

The Phelps also claimed on appeal that the jury's "verdict was the product of passion and bias." *Id.* at 23-24. Such an argument simply offers an alternative way of stating a challenge to the sufficiency of the evidence for both Intrusion and IIED in that it claims the jury's verdict was based on factors other than the presented evidence.

Whether or not the Phelps could have more effectively disputed the sufficiency of the evidence in the Court of Appeals is certainly debatable, but imprecise court filings are not unusual. As a descriptive and practical matter, determining such issues as whether a claim has been made or waived on appeal is more of an art than a science. Appellate courts are to approach making such determinations with a degree of flexibility. ***Singleton v. Wulff,*** 428 U.S. 106, 121 (1976) (citations omitted) ("The matter of what questions may be taken up and resolved for the first time on appeal is one left primarily to the discretion of the courts of appeals, to be exercised on the facts of individual cases. We announce no general rule.").

The argument by an *amicus*[5] in the Court of Appeals that the facts of this case did not meet the elements of the alleged torts was not a new claim, but an argument in support of a claim already made by the Phelps. As such, the Phelps may properly seek this Court's review of the issue in its Brief on the Merits and *amici* may seek to assist this Court by providing further argument supporting or opposing the claim. Clearly, Mr. Snyder suffers no prejudice in that he will have the opportunity to challenge the claim in his Reply Brief, just as he did in the Court of Appeals. *See Snyder*, 580 F.3d at 228 (Shedd, J., concurring).

The concurring opinion did note, however, that even if the sufficiency claim had been raised only by the brief of an *amicus*, an appellate court has the authority to review the issue. *Id.* at 227 (Shedd, J., concurring); *see also Teague v. Lane*, 489 U.S. 288, 300 (1989); *Davis v. U.S.*, 512 U.S. 452, 457 n.1 (1994). In addition, the fact that the Fourth Circuit panel chose to address the sufficiency claim invites this Court to do the same. *See Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995) ("[E]ven if this were a claim not raised by petitioner below, we would ordinarily feel free to address it, since it was addressed by the court below."); *see also Citizens United v. Federal Election Comm'n*, 130 S. Ct. 876, 882 (2010). Although the two-judge majority in the Court of Appeals held that the sufficiency claim had been waived, it did so only after evaluating the merits of the claim. "We are content to reject each of these non-First Amendment contentions without further discussion because they are all plainly *without merit.*" ***Snyder,*** 580 F.3d at 216 (emphasis added). A waived claim requires absolutely no consideration of the claim's merits. The statement that the non-First Amendment contentions were "plainly without merit" reveals that the two-judge majority conducted an evaluation of the contentions' substance, albeit a cursory one. Among the "non-First Amendment contentions" to which the judges were referring were "that Snyder had no privacy right," "that the jury was impermissibly biased," and the "district court made prejudicial evidentiary errors at trial." *Id.* As discussed above, the sufficiency of the evidence argument is surely relevant to each of these "non-First Amendment contentions."

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[5] *Amicus Curiae* Brief of the Thomas Jefferson Center for the Protection of Free Expression.

Moreover, the concurrence to the Fourth Circuit's opinion was based entirely on an assessment of the sufficiency of the evidence. "Although I agree with the majority that the judgment below must be reversed, I would do so on different grounds . . . I would hold that Snyder failed to prove at trial sufficient evidence to support the jury verdict on any of his tort claims." *Id.* at 227 (Shedd, J., concurring). Thus, all three members of the Fourth Circuit panel addressed the sufficiency of the evidence. In so doing, the Fourth Circuit made a ruling of law that is entirely appropriate for this Court's review.

Yet even if a challenge to the sufficiency of the evidence had not been advanced in the Court of Appeals, this Court has the plenary power to review a claim if it so chooses. "At its option... the Court may consider a plain error not among the questions presented but evident from the record and otherwise within its jurisdiction to decide." Sup. Ct. R. 24(1)(a). In this matter, the record simply does not contain evidence proving the elements of the alleged torts and therefore clearly warrants this Court's review of the issue.

C. Challenges to evidentiary conclusions of law should rarely be deemed waived in the appeals of First Amendment cases.

In *Bose Corp. v. Consumers Union of U.S., Inc.*, this Court stated that in cases alleging expression as unprotected under the First Amendment, it regularly conducts

> . . . an independent review of the record both to be sure that the speech in question actually falls within the unprotected category and to confine the perimeters of any unprotected category within acceptably narrow limits in an effort to ensure that protected expression will not be inhibited.

Bose, 466 U.S. 485, 505 (1984). Such review is constitutionally required. *Id.* at 510; *see also Hurley*, 515 U.S. 557, 567 (1995). Independent appellate review reflects "a deeply held conviction that judges... must exercise such review in order to preserve the precious liberties established and ordained by the Constitution." *Bose*, 466 U.S. at 511-12; (citing *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964)).

While the Fourth Circuit recognized the obligation to "make an independent examination of the entire record," it cited waiver to exclude review of the district court's findings of fact concerning the evidence and limited its examination to a single conclusion of law, namely whether the Phelps' expression was protected under the First Amendment and therefore immune from tort liability. ***Snyder***, 580 F.3d at 218 (citations omitted). This analysis represents an unduly constrained view of the appellate court's constitutional obligation in cases potentially defining the perimeters of the First Amendment. Appellate courts are expected to examine finding of facts "where a federal right has been denied as the result of a finding shown by the record to be without evidence to support it." ***Fiske v. Kansas***, 274 U.S. 380, 385-386 (1927) (citations omitted). Such encompassing scrutiny by appellate courts is vital

> [B]ecause the reaches of the First Amendment are ultimately defined by the facts it is held to embrace, and we must thus decide for ourselves whether a given course of conduct falls on the near or far side of the line of

> constitutional protection. Even where a speech case has originally been tried in a federal court, subject to the provision of Federal Rule of Civil Procedure 52(a) that '[f]indings of fact ... shall not be set aside unless clearly erroneous,' we are obliged to make a fresh examination of crucial facts.

Hurley, 515 U.S. 557, 567 (1984). In appeals not involving First Amendment claims, deference to a lower court's finding of facts is both reasonable and necessary for the efficient administration of justice. The Fourth Circuit's decision not to consider the sufficiency of the evidence, however, represents a failure to recognize that not all findings of fact deserve the same degree of deference. This is particularly true when findings of fact are so intermingled with a conclusion of law that a review of the facts becomes crucial to determine if First Amendment rights are being properly respected. *See Fiske*, 274 U.S. at 385-386. Yet here, a challenge to the sufficiency of the evidence would not require the Court to question or evaluate any of the district court's findings of fact. As the district court noted, "the facts of this case as presented at trial are largely undisputed." ***Snyder***, 533 F.Supp.2d at 571.What was in dispute were the district court's conclusions of law that its factual findings constituted the elements necessary to prove claims of Intrusion and IIED. Had the Court of Appeals reviewed the district court's conclusions of law regarding the evidence, the insufficiency of the evidence would have become readily apparent. A review of the facts to determine if some particular speech is protected under the First Amendment invariably includes examining the basis for claiming the expression is unprotected.

It must be acknowledged that the purpose of *Bose*-type independent appellate review is both to verify that the speech in question is actually unprotected and to confine the perimeters of any unprotected speech within acceptably narrow limits to ensure that protected expression will not be inhibited. *Bose*, 466 U.S. at 505. That being the case, it could be argued that evidentiary errors that do not speak to those purposes are irrelevant.

Yet such an argument must be qualified by the doctrine of constitutional avoidance. While it initially might appear ironic to argue that an approach to applying the law—one born out of concern for protecting First Amendment rights—should result in *not* addressing the First Amendment question, such irony dissipates upon further consideration. An independent review of the record does not presuppose a finding that the speech at issue is protected or not. The review therefore may result in a determination that the First Amendment is not an issue. Further, constitutional avoidance will only play a role if the independent review of the record reveals an alternative that will fully resolve the case without having to address the First Amendment question. Most importantly, however, the merits of constitutional avoidance are unchanged if in the course of a *Bose*-type review an appellate court determines the evidence to be insufficient as a matter of law to prove the underlying offense. As such, the doctrine of constitutional avoidance should counsel courts to determine if a case can be resolved on evidentiary grounds even if the issue was not raised on appeal.

While it is not common for the Court to address issues other than those presented in the petition, such a broader scope of review is certainly not unprecedented. It is within the plenary power of the Court to decide the case on issues other than those presented in a petition. Sup. Ct. R. 24(1)(a). In the instant case, the record simply does not contain evidence proving the elements of the alleged torts. That deficiency, combined with the Court's own mandate of independent review of the record and the doctrine of constitutional avoidance, clearly warrants this Court's review of the sufficiency of the evidence.

CONCLUSION

Amici respectfully urge this Court to affirm the Court of Appeals' judgment that the Phelps are not liable for the alleged torts.

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AMICUS CURIAE BRIEF

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IN THE
Supreme Court of the United States

ALBERT SNYDER,
Petitioner,
v.
FRED W. PHELPS, SR., SHIRLEY L. PHELPS-ROPER, REBEKAH A. PHELPS-DAVIS, WESTBORO BAPTIST CHURCH, INC.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR THE VETERANS OF FOREIGN WARS OF THE UNITED STATES AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE[1]

The Veterans of Foreign Wars of the United States ("VFW") is a federally chartered corporation, comprised of over 1.6 million men and women who have honorably served in our armed forces in conflicts on foreign soil. 36 U.S.C. § 230101. Founded in 1899, the VFW has a longstanding history of protecting the rights and honoring the service of America's veterans. As set forth in its Congressional Charter, the purposes of the VFW are educational, fraternal, patriotic, historical, charitable, and educational. 36 U.S.C. § 230102. One of its fundamental purposes is "to preserve and strengthen comradeship among its members; to assist worthy comrades; to perpetuate the memory and history of our dead, and to assist their widows and orphans." 36 U.S.C. § 230102 (1) – (3).

Fulfilling these promises and purposes, VFW members frequently assist in honoring their fallen comrades by participating in veteran funerals. Whether it is by providing honor guards, folding and presenting the flag, serving as pallbearers, or simply offering condolences to family, VFW members play a key role in ensuring that a veteran's final farewell is cloaked with the dignity and respect that should be shown to a patriot. Quite simply, the VFW helps fulfill our national obligation to demonstrate America's gratitude to those who, in times of both war and peace, have faithfully and honorably defended our country.

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[1] Counsel for both parties have consented in writing to the filing of this brief, and their consents have been filed with the Clerk of this Court. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief No person other than *amicus curiae* or its counsel made a monetary contribution to its preparation or submission.

In 2009 alone, more than 1,500 brave men and women made the ultimate sacrifice in active defense of our Nation.[2] Moreover, approximately 1,800 veterans die daily, cumulating in over 656,000 deaths per year.[3] Each of these deaths is a time of mourning, when family members and the Nation may demonstrate sincere gratitude and solemn respect for the sacrifice and service of the deceased. Instead, Respondents seek to turn this moment of personal grieving into a public opportunity to viciously attack the deceased's family, beliefs, and values. Accordingly, this case is of significant concern to the VFW and its members, who seek to preserve the sanctity, dignity, and privacy of veterans' funerals.

INTRODUCTION AND SUMMARY OF ARGUMENT

> "On behalf of the President of the United States, the Commandant of the Marine Corps, and a grateful nation,

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[2] DEPARTMENT OF DEFENSE, DEFENSE MANPOWER DATA CENTER, "U.S. Active Duty Military Deaths," http://siadapp.dmdc.osd.mil/personnel/CASUALTY/death_Rates.pdf (last visited May 26, 2010).

[3] Jeff Martin, *Buglers for Military Funerals are in Short Supply*, USA TODAY, Nov. 11, 2009, http://www.usatoday.com/news/military/2009-11-11-buglers_N.htm (last visited May 26, 2010) (quoting Jo Schuda, Department of Veterans Affairs).

> please accept this flag as a symbol of our appreciation for your loved one's service to Country and Corps."

So spoke the Marine who presented a folded American flag to the family of Lance Corporal Matthew A. Snyder, a twenty year old Marine who was killed during his service in Iraq. The Marine's message is clear – America, as a Nation, is eternally grateful for those who have paid the ultimate price while protecting our freedoms. To the grieving family, these are words of comfort and solace. Regretfully, this was not the only message the Snyder family received as they lay their son, an American hero, to rest.

> "Thank God for IEDs."
> "Thank God for Dead Soldiers."
> "God Hates You."
> "You're Going to Hell."

These were the Respondents' messages to Mathew Snyder's family at his funeral. Sadly, Respondents' hateful messages and venomous personal attacks did not end with their funeral protests. Shortly after Matthew's funeral, the Respondents continued their torment of Petitioner and his family by posting an "epic" on its website, www.godhatesfags.com, entitled "The Burden of Marine Lance Cpl. Matthew Snyder." In this "epic," Respondents made caustic accusations toward Matthew's parents, alleging they "taught Matthew to defy his creator," "raised him for the devil," and "taught him that God was a liar." Respondents also asserted "God rose up Matthew for the very purpose of striking him down." (Vol. XV at 3791).[4]

In a time of profound grief and emotional vulnerability, these personal attacks are an affront of the most egregious kind. Although under the First Amendment Respondents are free to express their religious beliefs and messages that others find unpatriotic, offensive, and reprehensible, the First Amendment does not permit Respondents to launch personal attacks targeted at private individuals during a time of mourning.

When examining First Amendment protection of speech, this Court has long balanced the freedom to speak against the targeted individual's right to privacy. Where offensive speech intrudes upon an unwilling audience's privacy in an intolerable manner, States are permitted to protect the privacy interests of these captive audiences.

Moreover, the First Amendment has never guaranteed the right to communicate one's views at all times and places or in any manner that may be desired. Indeed, numerous judicial exceptions to First Amendment protection exist. Where the speech is of little value and the potential harm is great, First Amendment protection is limited. Simply put, the First Amendment does not provide an unconditional and indefeasible immunity from tort liability.

Here, Respondents have repeatedly invaded the privacy of Albert Snyder, Lance Corporal Snyder's father, and his family in a manner that cannot be described as anything other than intolerable. This Court's jurisprudence does not permit Respondents to use the First Amendment as a shield from liability for the intentional cruelty they inflicted upon the Snyder family. Moreover, Respondents' speech is of little, if any, value. Conversely, the harm they inflicted upon a grieving family and the memory and service of a member of our Armed Forces is substantial and irreparable. Because grieving military families are unable to avoid such personal and vicious attacks as perpetrated by Respondents during the private burial of a loved one, protecting military funeral attendees from offensive speech is a natural extension of this Court's prior precedent.

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[4] Reference is to the Appendix Submitted to the Court of Appeals.

Accordingly, the VFW respectfully requests that this Honorable Court reverse the holding of the Court of Appeals for the Fourth Circuit and permit imposition of tort liability where the vicious, personal attacks of Respondents have intentionally inflicted severe emotional distress and intruded upon Petitioner's right to privacy in an intolerable manner. The families of our servicemen and women who have died in defense of our Nation deserve as much.

ARGUMENT

I. MOURNERS ATTENDING A MILITARY FUNERAL ARE CAPTIVE AUDIENCES

Central to the case before the Court is the balance between a grieving family's right to privacy – "to be let alone" – and the Respondents' freedom of speech.[5] When examining First Amendment protections, this Court has long considered the privacy rights of unwilling listeners. Specifically, this Court has permitted States to protect an individual's privacy rights from offensive speech where it is so intrusive that the unwilling audience cannot avoid it. This protection is commonly referred to as the "captive audience doctrine." While not requiring captivity in the sense that a person is restrained from leaving, courts have applied this doctrine to protect individuals who have been subjected to intrusive speech while in their homes, hospitals and medical clinics, as well as in such public venues as transportation facilities, high school graduation ceremonies, job centers and welfare offices, and even workplaces. Here, it would be a natural extension of the captive audience doctrine and this Court's precedent to apply it to funeral attendees who become unwilling targets of intrusive speech.

Captive, unwilling listeners have a recognizable privacy interest in avoiding unwanted communication where "the degree of captivity makes it impractical for the unwilling viewer or auditor to avoid exposure." *Hill v. Colorado*, 530 U.S. 703, 718 (2000) (quoting *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 209 (1975)). This Court has historically afforded "captive audience" protection to those settings where an individual seeks comfort or refuge, such as a person's home, ***Rowan v. United States Post Office Dep't***, 397 U.S. 728, 736 (1970); ***Frisby v. Schultz***, 487 U.S. 474, 485 (1988), or a hospital, ***Hill***, 530 U.S. at 715; ***accord Madsen v. Women's Health Ctr., Inc.***, 512 U.S. 753, 768 (1994) (prohibiting targeted picketing of hospital or clinic because patient is "captive" resident due to medical circumstances).[6]

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[5] Respondents' speech warrants little, if any, First Amendment protection. "Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution." *Chaplinsky v. State of New Hampshire*, 315 U.S. 568, 572 (1942) (quoting *Cantwell v. Connecticut*, 310 U.S. 296, 309-10 (1940)).

Courts have historically protected the home because it is "the last citadel of the tired, the weary, and the sick," *Gregory v. Chicago*, 394 U.S. 111, 125 (1969) (Black, J., concurring). Quite simply, there is no further place of retreat. *Rowan*, 397 U.S. at 736. Also, as places of refuge, hospitals are "where human ailments are treated, *where patients and relatives alike often are under emotional strain and worry*, where pleasing and comforting patients are principal facets of the day's activity, and *where the patient and [her] family . . . need a restful, uncluttered, relaxing, and helpful atmosphere*." *Hill*, 530 U.S. at 728-29 (quoting *NLRB v. Baptist Hosp., Inc.*, 442 U.S. 773, 783 (1979)) (quotation omitted) (emphasis added). People entering medical facilities are "often in particularly vulnerable physical and emotional conditions," thus warranting protection from unwanted communications. *Id.* Accordingly, the Court found the State's regulation of speech in these places of refuge to be constitutional. *Id.* at 734-35.

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[6] This Court has protected captive audiences in other circumstances not traditionally considered places of refuge, such as passengers traveling on public transportation. *Lehman v. City of Shaker Heights*, 418 U.S. 298, 302 (1974) (Blackmun, J., plurality opinion) (finding public transportation audience is captive audience). Other courts have broadly offered protection to captive audiences from unwanted speech. *See Nurre v. Whitehead*, 580 F.3d 1087, 1095 (9th Cir. 2009) (applying captive audience doctrine to high school graduation ceremony); *Make the Road by Walking, Inc. v. Turner*, 378 F.3d 133, 149 (2d. Cir. 2004) ("Welfare claimants are a captive audience in the Job Center waiting rooms."); *Bonnell v. Lorenzo*, 241 F.3d 800, 821 (6th Cir. 2001) (applying captive audience doctrine to college classroom); *Families Achieving Independence & Respect v. Neb. Dep't of Soc. Servs.*, 111 F.3d 1408, 1421 (8th Cir. 1997) (en banc) (finding clients waiting at Department of Social Services for receipt of welfare assistance are "virtually captive audience"); *Int'l Soc'y For Krishna Consciousness v. Rochford*, 585 F.2d 263, 268-69 (7th Cir. 1978) (holding bar on distribution of religious literature in secured concourses where travelers are captive audience permissible); *E.E.O.C. v. Preferred Mgmt. Corp.*, 216 F.Supp.2d 763, 809 (S.D. Ind. 2002) (noting "those subjected to unwelcome speech in the work place are 'captive audiences,' who enjoy some protection against otherwise protected speech.").

Funerals, like homes and hospitals, are places of refuge. As with private residences, funerals are a forum for intimate gatherings of families and friends. They are a sanctuary and place of retreat, the last citadel of sorrow and grief. The sanctity of cemeteries, and by extension funerals, has long been recognized. "Burial rites or their counterparts have been respected in almost all civilizations from time immemorial." *Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, 167 (2004) (citations omitted). Indeed, there is a belief "the resting-place of the dead [is] hallowed ground." *Brown v. Lutheran Church*, 23 Pa. 495, 500 (1854). Congress has specifically found national cemeteries, in which our Nation's brave soldiers are buried, to be "national shrines as a tribute to our gallant dead." 38 U.S.C. § 2403(c).[7] Arguably, there is no time when the right to be let alone may be more deserving of protection than during the mourning of a fallen hero who has perished in defense of our Nation.

Surviving family of the deceased, "like medical patients entering a medical facility, . . . are captive. If they want to take part in an event memorializing the deceased, they must go to the place designated for the memorial event." *McQueary v. Stumbo*, 453 F.Supp.2d 975, 992 (E.D. Ky. 2006); *cf. Favish*, 541 U.S. at 168 ("Family members have a personal stake in honoring and mourning their dead and objecting to unwarranted public exploitation that, by intruding upon their own grief, tends to degrade the rites and respect they seek to accord to the deceased person who was once their own."). Quite simply, the actions of Respondents force the families of the deceased to choose between memorializing their loved ones and encountering personal, vicious, and hateful speech.[8]

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[7] *See also* Abraham Lincoln, *Gettysburg Address* (November 19, 1863) ("[W]e can not dedicate . . . we can not consecrate . . . we can not hallow this ground. *The brave men, living and dead, who struggled here, have consecrated it, far above our poor power to add or detract.* The world will little note, nor long remember what we say here, but it can never forget what they did here.") (emphasis added).

[8] In addition to the personal attacks, it is the very presence of protestors, independently of their words, that is disruptive. *Frisby*, 487 U.S. at 498 (Stevens, J., dissenting) ("Picketing is a form of speech that, by virtue of its repetition of message and often hostile presentation, may be disruptive of an environment irrespective of the substantive message conveyed.").

Nothing in our Constitution compels grieving family members to suffer so.

The right of a family to be let alone during a loved one's funeral supersedes any First Amendment protection afforded to Respondents' speech. The First Amendment does not require the grieving family to endure offensive speech of a personally abusive nature that encroaches upon the sacred time of grieving for and mourning the loss of their son or daughter. In this case, Snyder's substantial privacy interest in attending his son's funeral has been invaded and outweighs Respondents' First Amendment right to speak in an intolerably indecent manner. ***Erznoznik***, 422 U.S. at 209-10 ("The ability of the government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is . . . dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner.") (quotation omitted).

Here, there is no question that Respondents speech was intolerably intrusive:

> "Thank God for Dead Soldiers;"
> "Thank God for IEDs;"
> "Semper Fi Fags;"
> "You're Going to Hell;"
> "God Hates You;"
> "Pope in Hell;"
> "Don't Pray for the USA."

No one could have possibly regarded Respondents' words as anything other than a "direct personal insult." *See Cohen v. California*, 403 U.S. 15, 20 (1971). Accordingly, as Snyder, in order to mourn his son, was an unwilling audience to Respondents' invasion of his privacy, the State has the right to provide protection to him in the form of tort liability.

II. THE FIRST AMENDMENT HAS NEVER PROVIDED AN UNCONDITIONAL AND INDEFEASIBLE IMMUNITY FROM TORT LIABILITY

This Court has long recognized that the First Amendment provides "no special immunity from the application of general laws," nor does it grant any special privilege "to invade the rights and liberties of others." *Branzburg v. Hayes*, 408 U.S. 665, 683 (1972). Simply put, the First Amendment does not provide an "unconditional and indefeasible immunity from liability" in tort law. *Gertz v. Welch*, 418 U.S. 323, 341 (1974). Indeed, as correctly noted by the District Court, the "First Amendment does not afford absolute protection to individuals committing acts directed at other private individuals." *Snyder v. Phelps*, 533 F.Supp.2d 567, 570 (D.C. Md. 2008).

In a tort action, First Amendment protection of speech must be balanced against the State's legitimate interest in protecting its citizens from wrongful injury. *Gertz*, 418 U.S. at 347; *see also New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) (permitting recovery for defamation under certain circumstances); *Dun & Broadstreet v. Greenmoss Builders*, 472 U.S. 749 (1985) (plurality opinion) (same); *Hustler v. Falwell*, 485 U.S. 46 (1988) (permitting recovery for intentional infliction of emotional distress under certain circumstances); *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990) (permitting recovery for defamation under certain circumstances). Accordingly, States "retain substantial latitude" in providing tort remedies to their citizens. *Gertz*, 418 U.S. at 345-46. A State's interest in protecting its citizens from injury is particularly strong for the tort of intentional infliction of emotional distress, where the injury from the tort is "as limitless as the human capacity for cruelty." *Howell v. New York Post Co.*, 81 N.Y.2d 115, 122 (1993).

Here, the need for State protection and availability of a civil remedy is clear. This is not a case of a public figure seeking recovery for damage to his reputation. Nor is this a case of imposing liability for speech of a public concern. Rather, this is a case of a private citizen – a grieving father – who seeks recovery for the intolerable intrusion of Respondents during his son's funeral. Respondents have egregiously intruded upon the Snyder family's final moments with their deceased son. The hateful messages, which personally attacked Lance Corporal Snyder's family have inflicted severe emotional distress. The jury had no trouble finding that Albert Snyder was injured by the Respondents' reprehensible conduct. If Albert Snyder, a grieving father of an American hero, cannot seek remedy from Respondents for the emotional torment Respondents viciously imposed upon him, what purpose do our laws serve? Respondents cannot use the First Amendment as both a weapon of hate and then use it as a shield of false righteousness. Such use would be a perversion of everything America stands for.

III. OFFENSIVE SPEECH TARGETING FAMILIES DURING MILITARY FUNERALS SHOULD NOT BE PROTECTED BY THE FIRST AMENDMENT

"Congress shall make no law . . . abridging the freedom of speech, or of the press. . ." U.S. Const. amend. I. Notwithstanding this seemingly absolute prohibition, "the unconditional phrasing of the First Amendment was not intended to protect every utterance." *Roth v. United States*, 354 U.S. 476, 483 (1957); *see also Miller v. California*, 413 U.S. 15, 23 (1972) ("The First and Fourteenth Amendments have never been treated as absolutes."). The "First Amendment does not guarantee the right to communicate one's views at all times and places or in any manner that may be desired." *Heffron v. Int'l Soc'y for Krishna Consciousness*, 452 U.S. 640, 647 (1981) (citations omitted).[9]

Accordingly, this Court has created numerous judicial exceptions to First Amendment protection, which reflect a willingness to protect the legitimate and compelling interests of the State and its citizens. Obscenity,[10] fighting words,[11] and speech that incites unlawful activity[12] have historically been categorically denied protection under the First Amendment. Untruthful or misleading commercial speech are similarly unprotected.[13] Additionally, the Court has found speech relating to certain criminal activities unworthy of protection.[14] Moreover, in the

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[9] "It does not guarantee media attention," as Respondents seek here. *White House Vigil for ERA Comm. v. Clark*, 746 F.2d 1518, 1538 (D.C. Cir. 1984); *Vietnam Veterans Against the War v. Morton*, 506 F.2d 53, 58 (D.C. Cir. 1974) ("What the litigant's press agent seeks and what the public interest requires differ widely. Although every man is entitled to make his remonstrance, no man is entitled to make such a remonstrance that it will be carried on all three television networks.")

[10] *Miller v. California*, 413 U.S. 15, 23 (1973). ("This much has been categorically settled by the Court, that obscene material is unprotected by the First Amendment.")

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[11] *Chaplinsky v. New Hampshire*, 315 U.S 568, 572 (1942) (classifying "'fighting' words" as speech where "punishment of which have never been thought to raise any Constitutional problem")

[12] *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (noting State may "forbid or proscribe advocacy of the use of force or of law violation [only] where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or to produce such action").

[13] *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 771-72 (1976) ("The First Amendment, as we construe it today, does not prohibit the State from insuring that the stream of commercial information flow cleanly as well as freely."),

[14] Specifically, the First Amendment does not protect conspiracy, *United States v. Williams*, 553 U.S. 285, 298 (2008) (referring to conspiracy as subject to a "long established criminal" proscription and "undeserving of First Amendment protection"); offers to engage in illegal transactions, *Williams*, 553 U.S. at 297 ("Offers to engage in illegal transactions are categorically excluded from First Amendment protection."); solicitation, *Brown v. Hartlage*, 456 U.S. 45, 55 (1982) ("[W]hile a solicitation to enter into an agreement arguably crosses the sometimes hazy line distinguishing conduct from pure speech, such a solicitation, even though it may have an impact in the political arena, remains in essence an invitation to engage in an illegal exchange for private profit, and may properly be prohibited"); and antitrust violations. *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 498 (1949) (Rejecting argument that "the constitutional freedom for speech and press extends its immunity to speech or writing used as an

civil context, the Court has never interpreted the First Amendment to permit "unconditional and indefeasible immunity from liability." *Gertz*, 418 U.S. at 341; *see e.g.*, *Sullivan*, 376 U.S. at 279-80 (noting defamatory speech is actionable for public figures if "statement was made with 'actual malice'"); *Cantrell v. Forest City Publ'g Co.*, 419 U.S. 245 (1974) (finding speech that portrays plaintiff in false light actionable); *Time, Inc. v. Hill*, 385 U.S. 374 (1967) (same).[15] Thus, in actuality, there is a significant portion of speech that is not afforded First Amendment protection.

Although the Court has not articulated a single, unified theory for delimiting the scope of First Amendment protection, the Court repeatedly has considered two factors in determining if speech is protected: the harm that the speech causes and the value of the speech. *See Chaplinsky*, 315 U.S. at 571-72 (noting balance between speech value and social interests). Examination of these two factors reveals

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integral part of conduct in violation of a valid criminal statute").

[15] Indeed, sexual harassment may even be considered speech unworthy of First Amendment protection. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 23 (1993) (assigning weight to derogatory comments made to plaintiff, without discussing any limitations imposed by the First Amendment despite the fact that parties had briefed the issue, in setting standards for hostile-work-environment claim under Title VII); *but see Saxe v. St. College Area Sch. Dist.*, 240 F.3d 200, 209-10 (3d Cir. 2001) (finding "we have found no categorical rule that divests 'harassing' speech, as defined by federal anti-discrimination statutes, of First Amendment protection," and referring to "the very real tension between anti-harassment laws and the Constitution's guarantee of freedom of speech.")

that, similar to obscenities and other unprotected speech, Respondents' vicious personal attacks upon grieving military families is unworthy of First Amendment protection. Accordingly, recognition of a judicial exception that permits imposition of tort liability for such reprehensible conduct is not only warranted, but appropriate in protecting the welfare of our servicemen and women and their families

A. The Value of Respondents' Speech is Minimal.

This Court has "long recognized that not all speech is of equal First Amendment importance." *Dun & Bradstreet, Inc.*, 472 U.S. at 758. Of particularly little value is speech of protesters who "do not seek to disseminate a message to the general public, but to intrude upon the targeted [individual], and to do so in an especially offensive way." *Frisby*, 487 U.S. at 486. As explained in *Chaplinsky*:

> There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. *It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth* that any benefit that may be derived from them is clearly

> outweighed by the social interest in order and morality.

315 U.S. at 571-72 (emphasis added). The crux of speech's value lies in its contribution to either the pursuit of truth or the exchange of ideas. *See, e.g., Engquist v. Or. Dep't of Agric.*, 553 U.S. 591, 128 S. Ct. 2146, 2152 (2008) (finding "speech on matters of public concern" represents "the core of First Amendment protection"); *Morse v. Frederick*, 551 U.S. 393, 403 (2007) ("Political speech, of course, is 'at the core of what the First Amendment is designed to protect.'" (quoting *Virginia v. Black,* 538 U.S. 343, 365 (2003))); *Landmark Commc'ns, Inc. v. Virginia*, 435 U.S. 829, 838 (1978) ("Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs." (quoting *Mills v. Alabama,* 384 U.S. 214, 218 (1966)) (internal quotation marks omitted)).

Here, the intolerably vicious and personal attacks of Respondent are completely without any "redeeming social importance."[16]

> "Fag troops;"
> "You're going to hell;"
> "God hates you;"

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[16] William J. Brennan, Jr., The Supreme Court and the Meiklejohn Interpretation of the First Amendment, 79 HARV. L. REV. 1, 5-6 (1966) ("[I]mplicit in the history of the first amendment is the rejection of speech that is utterly without redeeming social importance"). Further, even if the speech had any societal value, it was directed at mourners who were without power to change United States policy.

> "Semper fi fags;"
> "Thank God for IEDs;"
> "Thank God for dead soldiers."

Noticeably absent from these abhorrent messages is the exposition of political ideas. Rather, the messages specifically target the family of a deceased Marine. Moreover, with all due respect to the Court of Appeals for the Fourth Circuit, these messages are not "loose, figurative, or hyperbolic language." *Snyder v. Phelps*, 580 F.3d 206, 223 (4th Cir. 2009). They are arrows aimed to cause maximum injury. Respondents believe every message displayed on the signs – the messages are literal, not rhetorical. Such messages, similar to obscenities, have little, if any, free speech value. They are intended to hurt. Indeed, "[t]o equate the free and robust exchange of ideas and political debate" with Respondents personal attacks "*demeans the grand conception of the First Amendment and its high purposes in the historic struggle for freedom.*" *Miller*, 413 U.S. at 34 (emphasis added)

B. The Harm Significantly Outweighs Any Free Speech Value.

The extreme psychological and emotional harm incurred by Snyder and his family as a result of Respondent's egregious intrusions are self-evident. Moreover, Respondents speech attacks them at the time when and in the place where they would say their final farewell to their loved one and our Nation's final farewell to its fallen hero. Collectively and individually, these harms outweigh the infinitesimal value of Respondents' speech.

We ask the men and women who serve in our Armed Forces to put their lives at risk to defend the very rights at issue before the Court in this case. We ask them to put themselves at risk so that we can argue here for the appropriate balancing of these rights according to the rule of law. Lance Corporal Snyder gave us everything he had to give. What is it that we are to give to him and his grieving family?

The least we can give is common decency. From the earliest of times, human beings have sanctified funerals and burials. Human beings have always recognized and respected this. Indeed, the grossest abominations in human history have been the moments when human life and human death have been most grossly disrespected.

There is arguably no American more worthy of respect, dignity, honor and decency than a man or woman who has sacrificed his or her life in service to our Country. There is no group more deserving of our comfort and compassion than his or her family. We are obligated "to care for him who shall have borne the battle, and for his widow, and his orphan," for his father and family. Abraham Lincoln, *Second Inaugural Address* (March 4, 1865). If there is not room for this in the Constitution, then for what purpose is it to be defended?

This fundamental right of human dignity has been recognized across the United States.[17]

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[17] *See* 38 U.S.C. § 2413; 18 U.S.C. § 1388; Ala. Code § 13A-11-17 (2007); Ark. Code Ann. § 5-71-230 (2007); Colo. Rev. Stat. § 13-21- 126 (2007); Del. Code Ann. tit. 11, § 1303 (2007); Fla. Stat. § 871.01 (2007); Ga. Code Ann. § 16-11-34.2 (2007); Idaho Code Ann. § 18-6409 (2008); 720 Ill. Comp.

Congress and forty-one state legislatures have enacted statutes that send one unmistakable and united message, that "[u]nwanted intrusion during the last moments the mourners share with the deceased during a sacred ritual surely infringes upon the recognized right of survivors to mourn the deceased." *Phelps-Roper v. Strickland*, 539 F.3d 356, 366 (6th Cir. 2008). This is in keeping with the historical truth that funerals are "well-established cultural tradition[s]," which signify "the respect society shows for the deceased and for the surviving family members." *Favish*, 541 U.S. at 168; *accord, Phelps-Roper v. Taft*, 523 F.Supp.2d 612, 619 (N.D. Ohio 2007) (asserting state has "a significant interest in protecting its citizens from disruption during the

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Stat. Ann. 5/26-6 (2008); Ind. Code Ann. § 35-45-1-3 (2008); Iowa Code Ann. § 723.5 (2008); Kan. Stat. Ann. § 21-4015 (2007); Ky. Rev. Stat. Ann. §§ 525.145, .145 (2007); La. Rev. Stat. Ann. § 14:103 (2008); Me. Rev. Stat. Ann. tit. 17A, § 501-A (2007); Md. Code Ann. Crim. Law § 10-205 (2007); Mass. Ann. Laws ch. 272, § 42A (2007); Mich. Comp. Laws Ann. §§ 123.1112-13 (2007); Minn. Stat. Ann. § 609.501 (2008); Miss. Code Ann. § 97-35-18 (2007); Mo. Ann. Stat. § 578.501 (2008); Mont. Code Ann. § 45-8-116 (2007); Neb. Rev. Stat. §§ 28-1320-01 to 1320.03 (2007); N.H. Rev Stat. Ann. § 644:2-b (2007); N.J. Stat. Ann. § 2C:33-8.1 (2008); N.M. Stat. Ann. § 30-20B-1-5 (2007); N.Y. Penal Law § 240.21 (McKinney 2000); N.C. Gen. Stat. § 14- 288.4 (2007); N.D. Cent. Code § 12.1-31-01.1 (2007); Ohio Rev. Code Ann. § 3767.30 (2008); Okla. Stat. tit. 21, § 1380 (2007); 18 Pa. Cons. Stat. Ann. § 7517 (2008); S.C. Code Ann. § 16-17-525 (2007); S.D. Codified Laws §§ 22-13-17 to 22-13-20 (2007); Tenn. Code Ann. § 39-17-317 (2007); Tex. Penal Code Ann. §§ 42.055, 42.04 (2008); Utah Code Ann. § 76-9-108 (2007); Vt. Stat. Ann. tit. 13, § 3771 (2007); Va. Code Ann. § 18.2-415 (2008); Wash. Rev. Code Ann. § 9A.84.030 (2008); Wis. Stat. Ann. §§ 947.01, 947.011 (2007); Wyo. Stat. Ann § 6-6-105 (2007).

events associated with a funeral or burial service."). Funerals reflect the "interests decent people have for those whom they have lost." *Favish*, 541 U.S. at 168.[18]

Where a soldier is young, such as twenty year old Lance Corporal Matthew Snyder, the tragedy of a premature death makes the funeral a particularly painful experience. Military rituals underscore sacrifice, service and duty and may help the bereaved to begin to find an acceptable explanation of why the loss occurred. Indeed, the solemnity of a military funeral helps provide "a deep and lasting healing to family members and loved ones." Expert Report of Chaplain Callis (Pet. Supp. App. at 173a).[19] As George Washington cautioned over 200 years ago, "[t]he willingness with which our young people are likely to serve in any war, no matter how justified, shall be directly proportional as to how they perceive veterans of earlier wars were treated and appreciated by this country." George Washington (1789).

The VFW has a Congressional mandate "to perpetuate the memory and history of our dead, and to assist their widows and orphans." 36 U.S.C.

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[18] Congress has specifically recognized the importance of dignity and sanctity in burying our soldiers. Federal law now mandates providing military honors detail for a veteran's funeral upon request of the family. 10 U S.C. § 1491(a); *accord*, DEPARTMENT OF DEFENSE DIRECTIVE 1300.15 (Jan. 11, 2001). A military funeral is the "ceremonial paying of respect and the final demonstration of the country's gratitude to those who, in times of war and peace, have faithfully defended our Nation." *Id.* at E2.1.5

[19] References are to the Petitioner's Supplemental Appendix Submitted to the Court of Appeals

§ 230102. This mandate cannot be fulfilled if the First Amendment is to be perverted in the hateful and despicable manner argued for by Respondents. Surely, Respondents are entitled to their opinions, and even to express them, but not over the graves and in the faces of the grieving families of our servicemen and women.

CONCLUSION

No family experiencing the anguish and heartache of losing a loved one should be deprived of a solemn and dignified funeral uninterrupted by protesters, police, counter-protestors, and potential riots. This is particularly true for military families who have lost a loved one who made the ultimate sacrifice in defending the very rights at issue in this case.

Although "[w]e may never understand what compels a small group of small minded and mean hearted people to harass a family in mourning," we cannot permit Respondents to hide behind the First Amendment to avoid responsibility for the pain they have inflicted. 152 CONG. REC. S5129 (daily ed. May 24, 2006) (statement of Sen. Frist); *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 728-29 (1871) (stating religious freedom includes right to express and disseminate religious doctrine "***which does not violate the laws of morality and infringe personal rights***") (emphasis added). Respondents have perverted the very right Lance Corporal Snyder died to defend.

Since 2001, over 5,000 of our servicemen and women have died while defending our Nation and the principles at issue in this case during a time of war.[20] Each and every one of them and their families deserve, and have earned, a dignified and honorable funeral. We owe them at least that much. They are not strangers, they are our brothers, sisters, mothers, fathers, husbands, sons, daughters, neighbors and friends. They defend us in times of war and peace and they serve us and the World in times of need. Many, such as Lance Corporal Snyder, make the ultimate sacrifice on our behalf.

A grieving family's last memory should not and cannot be permitted to be a memory forever tainted and cheapened by Respondents' hate: "Thank God for Dead Soldiers" or "You're Going to Hell." There is no greater love than that a man lay down his life for his friends. We have a solemn duty and obligation to those who have done so for our Country and to their families. We must honor them, we must maintain their dignity, and we must preserve their memory. The failure to do so will cause not only irreparable harm to Albert Snyder and his family, but to everything this Nation stands for and all who have served in our Armed Forces to make it so.

For the foregoing reasons, *Amicus Curiae*, Veterans of Foreign Wars of the United States, respectfully requests that this Honorable Court reverse the decision of the Court of Appeals for the Fourth Circuit.

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[20] Daily, approximately 1,800 veterans of our Armed Forces, pass away, cumulating to an annual total of over 656,000. The passing of a veteran should be marked as a solemn affair and not as an opportunity for Respondents' to torment the deceased's family and friends. The service and sacrifice of all our veterans and of all our current members of the Armed Forces demands respect, honor, and dignity during this time of bereavement.

Respectfully Submitted,

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